Supreme Court, U.S.
FILED
DEC 2 1985
JOSEPH F. SPANIOL, JR.
CLERK

85-949

No. .....

In The

Supreme Court of the United States

October Term, 1985

St. Regis Mohawk Tribe, New York,

Petitioner,

vs.

William E. Brock, Secretary of Labor,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JEANNE S. WHITEING
Counsel of Record
Native American Rights Fund
1506 Broadway
Boulder, Colorado 80302
(303) 447-8760

RICHARD J. DAUPHINAIS
Native American Rights Fund
1712 "N" Street, N.W.
Washington, D.C. 20036
(202) 785-4166

Attorneys for the St. Regis Mohawk Tribe

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

QUESTIONS PRESENTED

1. Whether Section 106(b) of the Comprehensive Employment and Training Act (CETA), 29 U.S.C. 816(b), which states that the Secretary of Labor "shall" issue a final determination within 120 days of the receipt of a complaint alleging the unlawful use of CETA funds by a grant recipient, bars the Secretary from recovering grant funds when he fails to issue a final determination within the 120-day period.

2. Whether the Secretary of Labor has authority either under the 1973 or 1978 versions of CETA to direct repayment of funds granted in 1975 and 1976.

3. Assuming the Secretary of Labor had such authority, whether that authority or the ability to seek repayment were lost when the Comprehensive Employment and Training Act was repealed in 1982.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT:	
1. There Is An Undisputed Conflict In The Circuits Involving The 120-Day Issue	6
2. This Court Should Also Review The Additional Issues Decided by the Second Circuit in this Case	8
a. The 1973 CETA Did Not Provide Authority to Seek Repayment	8
b. The 1978 CETA Should Not Be Applied Retroactively	11
c. Even Assuming CETA Provided Repayment Authority, That Authority Has Been Lost	12
CONCLUSION	14
APPENDIX	

TABLE OF AUTHORITIES

Page(s)

Atlantic County v. U.S. Department of Labor, 713 F.2d 834 (3d Cir. 1983) 9

Bell v. New Jersey, 461 U.S. 773 (1983) 9, 10, 11

Bennett v. New Jersey, — U.S. —, 105 S.Ct. 1555 (1985) 12

California Tribal Chairmen's Association v. U.S. Department of Labor, 730 F.2d 1289 (9th Cir. 1984) 9

City of Chicago v. U.S. Department of Labor, 775 F.2d 196 (7th Cir. 1985) 7

City of Edmonds v. Department of Labor, 749 F. 2d 1419 (9th Cir. 1984) 6

Greene v. United States, 376 U.S. 149 (1964) 12

Lehigh Valley Manpower Program v. Donovan, 719 F.2d 99 (3d Cir. 1983) 6

Milwaukee County, Wisc. v. Donovan, 771 F.2d 983 (7th Cir. 1985) 7

Mobile Consortium of CETA v. U.S. Department of Labor, 745 F.2d 1416 (11th Cir. 1984) 9

North Carolina Commission of Indian Affairs v. U.S. Department of Labor, 725 F.2d 238 (4th Cir. 1984), *cert. denied*, — U.S. —, 105 S.Ct. 112 (1984) 9

Pennhurst State School & Hospital v. Halderman, 451 U.S. 1 (1981) 12

Pierce County v. Department of Labor, 759 F.2d 1398 (9th Cir. 1985), *cert. granted*, 54 U.S.L.W. 3293 (Nov. 4, 1985) 6, 7, 8, 13

St. Regis Mohawk Tribe v. Brock, 759 F.2d 38 (2nd Cir. 1985) 7

Texarkana Metropolitan Area Manpower Consortium v. Donovan, 721 F.2d 1162 (8th Cir. 1983) 9

TABLE OF AUTHORITIES—Continued

Page(s)

FEDERAL STATUTES

20 U.S.C. § 2835 10

29 U.S.C. § 1591 (d) and (e) 13

29 U.S.C. § 817 6

Pub. L. No. 93-203, 87 Stat. 839 *et seq.* 4

Pub. L. No. 95-524, 92 Stat. 1909 *et seq.* 4

Pub. L. No. 97-300, § 184(a)(1), 96 Stat. 1357 12

§ 207(a)(1) of the Elementary and Secondary Education Act 9

Comprehensive Employment and Training Act (CETA), § 106(b), 29 U.S.C. (Supp V 1981) 816(b) 2, 6, 7

Comprehensive Employment and Training Act (CETA), § 602(b), 87 Stat. at 878 ..... 8, 9, 10, 11

Comprehensive Employment and Training Act (CETA), § 126(b), 92 Stat. at 1945 10

Comprehensive Employment and Training Act (CETA), § 106(d)(1), 92 Stat. at 1327 ..... 3, 10, 11

Job Training Partnership Act of 1982, Act of October 13, 1982, § 184, 96 Stat. at 1357-58 4

CONGRESSIONAL MATERIAL

124 Cong. Rec. 25170 10

124 Cong. Rec. 25187, 27223 10

MISCELLANEOUS

20 C.F.R. § 676.92(b) 6

Sands, *Sutherland Statutory Construction* (4th ed.) 11, 13

No. .....

In The

Supreme Court of the United States

October Term, 1985

St. Regis Mohawk Tribe, New York,

Petitioner,

vs.

William E. Brock, Secretary of Labor,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The St. Regis Mohawk Tribe, New York, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on July 17, 1985.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 759 F.2d 38 (2nd Cir. 1985) and is reproduced at App. 1-32. The opinion of the Administrative Law Judge is unreported and is reproduced at App. 33-57.

JURISDICTION

The judgment of the court of appeals was entered on July 17, 1985. On September 23, 1985, Justice Marshall extended the time within which to file a petition for writ of certiorari to and including December 2, 1985. The jurisdiction of the court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 106(b) of the Comprehensive Employment and Training Act, 29 U.S.C. (Supp. V 1981) 816(b), provides in pertinent part:

> Whenever the Secretary receives a complaint from any interested person or organization * * * which alleges, or whenever the Secretary has reason to believe (because of an audit, report, on-site review, or otherwise) that a recipient of financial assistance under this chapter is failing to comply with the requirements of this chapter, the regulations under this chapter or the terms of the comprehensive employment and training plan, the Secretary shall investigate the matter. The Secretary shall conduct such investigation, and make the final determination required by the following sentence regarding the truth of the allegation or belief involved, not later than 120 days after receiving the complaint. If, after such investigation, the Secretary determines that there is substantial evidence to support such allegation or belief that such a recipient is failing to comply with such requirements, the Secretary shall, after due notice and opportunity for a hearing to such recipient, determine whether such allegation or belief is true.

Section 602 (b) of the 1973 CETA, 87 Stat. 878 provides:

> The Secretary may make such grants, contracts, or agreements, establish such procedures (subject to such policies, rules, and regulations as he may prescribe), and make such payments in installments and in advance or by way of reimbursement, or otherwise allocate or expend funds made available under this Act, as he may deem necessary to carry out the provisions of this Act, including (without regard to the provisions of section 4774(d) of title 10, United States Code) expenditures for construction, repairs, and capital improvements, and including necessary adjustments in payments on account of overpayments or underpayments. The Secretary may also withhold funds otherwise payable under this Act, but only in order to recover any amounts expended in the current or immediately prior fiscal year in violation of any provision of this Act or any term or condition of assistance under this Act.

Section 106(d)(1) of the 1978 CETA, 92 Stat. at 1927, provides:

> If the Secretary concludes that any recipient of funds under this Act is failing to comply with any provision of this Act or the regulations under this Act or that the recipient has not taken appropriate action against its subcontractors, subgrantees, and other recipients, the Secretary shall have the authority to terminate or suspend financial assistance in whole or part and order such sanctions or corrective actions as are appropriate, including the repayment of misspent funds from sources other than funds under this Act and the withholding of future funding, if prior notice and an opportunity for a hearing have been given to the recipient. Whenever the Secretary orders termination or suspension of financial assistance to a subgrantee or subcontractor (including operators under a nonfinancial agreement), the Secretary shall have authority to take whatever action is necessary to enforce such order, including action directly against the subgrantee

or subcontractor, and an order to the primary recipient that it take such legal action, to recoup misspent funds or to otherwise protect the integrity of the funds or ensure the proper operation of the program.

———o———

STATEMENT OF THE CASE

Petitioner seeks review of a decision of the Second Circuit Court of Appeals holding that the Secretary of Labor can recover from non-CETA funds disallowed costs involving a Comprehensive Employment and Training Act[1] grant awarded to the St. Regis Mohawk Tribe.

The St. Regis Mohawk Tribe is a small tribe located in northeastern New York near the Canadian border. The Tribe sought funds as a prime sponsor under CETA beginning in 1975 for employment and training programs for tribal members, 97% of whom were at or below the poverty level.

Grants were awarded to the Tribe for programs under various titles of CETA. The Tribe used the funds for training programs, public service jobs and summer youth employment programs. Two grants are at issue: No. 99-6-522-30-127 (Grant No. 127), covering the period December 22, 1975 to January 31, 1977; and Grant No. 99-7-522-30-56 (Grant No. 54), covering the period October 1, 1976

---

[1]CETA originally was enacted in 1973 (Pub. L. No. 93-203, 87 Stat. 839 *et seq.*) and was amended substantially in 1978 (Pub. L. No. 95-524, 92 Stat. 1909 *et seq.*). The CETA was repealed effective October 13, 1982, and replaced by the Job Training Partnership Act, 29 U.S.C. 1501 *et seq.* (Pub. L. No. 97-300, § 184(a)(1), 96 Stat. 1357).

to December 31, 1978. The Tribe was awarded $27,503 under Grant No. 127, and $1,012,830 under Grant No. 54.

The grants were audited in early 1978. The final audit report is dated May 5, 1978. The audit covered all of Grant No. 127, but covered Grant No. 54 only through September 30, 1977. For Grant No. 127, the audit recommended that costs of $5,351 be disallowed, and costs of $16,255 were questioned, a total of $21,606. For Grant No. 54, the audit recommended that costs of $36,881 be disallowed, and costs of $92,179 were questioned, a total of $129,060.

The Grant and Audit Closeout Task Force of the Employment and Training Administration (Grant Officer) issued a Final Determination in the matter on September 28, 1981, nearly three and a half years after the audit. The Final Determination covering the full terms of both grants disallowed $68,334 in costs.

The Tribe filed a timely request for an administrative hearing on the Final Determination. The hearing was held in New York on December 17, 1982. Additional documentary evidence and affidavits were submitted by both parties in March and May of 1983, and the parties completed briefing in June 1983.

The Administrative Law Judge issued his Decision and Order on January 4, 1985. Based on the evidence, the ALJ reduced the disallowed costs to $39,045.03, and ordered repayment of this amount out of non-CETA funds. The ALJ also ruled against the Tribe on the two legal issues presented in this petition and other legal issues raised by the Tribe.

On January 30, 1985, the Tribe requested the Secretary of Labor to review the ALJ's decision and order. Review was denied by letter dated March 1, 1985, and the ALJ's decision and order thus became the final decision of the Secretary of Labor. *See* 29 U.S.C. § 817 and 20 C.F.R. § 676.92(b).

A timely petition for review of the Secretary of Labor's decision was filed in the Second Circuit Court of Appeals. The Second Circuit denied the petition on July 17, 1985.

———o———

REASONS FOR GRANTING THE WRIT

1. There Is An Undisputed Conflict In The Circuits Involving The 120-Day Issue

There is a clear and undisputed conflict in the circuits concerning the effect of the 120-day provision in section 106(b) of CETA on the Secretary of Labor's ability to collect disallowed CETA grant costs. Four separate courts of appeals have ruled on this issue. The Ninth and Third Circuits have held that the Secretary's failure to make a final determination on a complaint or audit within 120-days of receipt divests him of jurisdiction to collect disallowed costs. *Pierce County v. Department of Labor,* 759 F.2d 1398 (9th Cir. 1985), *cert. granted,* 54 U.S.L.W. 3293 (Nov. 4, 1985); *City of Edmonds v. Department of Labor,* 749 F.2d 1419 (9th Cir. 1984); *Lehigh Valley Manpower Program v. Donovan,* 719 F.2d 99 (3d Cir. 1983).

On the other hand, the Second and Seventh Circuits have held that the Secretary's failure to comply with the

120-day requirement does not mandate dismissal of an action by the Secretary to collect disallowed costs. *City of Chicago v. U.S. Department of Labor,* 775 F.2d 196 (7th Cir. 1985); *Milwaukee County, Wisc. v. Donovan,* 771 F.2d 983 (7th Cir. 1985); *St. Regis Mohawk Tribe v. Brock, supra.* Thus the decision below in this case falls in the second category of decisions, in direct conflict with the decisions from the Ninth and Third Circuits.

The conflict is clear and direct. The above cases construe the identical provision, section 106(b) of CETA, in a different manner. More specifically, *Pierce County v. Department of Labor, supra* and *St. Regis Mohawk Tribe v. Brock, supra,* both construe section 106(b) in the context of an audit (as opposed to a complaint), with directly conflicting results.

The conflict in the circuits is not disputed by the Department of Labor. In fact, DOL described and relied on this conflict in asking the Court to review the Ninth Circuit's decision in *Pierce County v. Department of Labor, supra. See* Petition for a Writ of Certiorari filed by the Department of Labor in *Brock v. Pierce County,* No. 85-385, on September 4, 1985, 54 U.S.L.W. 3170. The Court, presumably relying on this conflict, granted certiorari on November 4, 1985, 54 U.S.L.W. 3293.

Resolution of the issue is important because of the significant number of cases in which the issue is being raised as evidenced by the six cases ruled on by the courts of appeals so far. There are also numerous cases pending before the Department of Labor. *See* App. 7, n.3.

2. This Court Should Also Review The Additional Issues Decided by the Second Circuit in This Case

As shown in Part 1 above, this Court should grant review in this case because the case raises the same issue already before this Court in *Brock v. Pierce County, supra.* In doing so, this Court should also grant review of petitioner's additional challenges to the Secretary of Labor's authority. In its most basic form, the issue in *Pierce County* is whether the Secretary of Labor can seek repayment. Petitioner's additional challenges in this case are part and parcel of that same basic issue. Review by this Court of the additional challenges would therefore allow for a complete examination of the Secretary's repayment authority. Such review is also warranted because the Second Circuit's rejection of the additional challenges was, as shown below, in error.

a. The 1973 CETA Did Not Provide Authority to Seek Repayment

The Second Circuit decided that the Secretary of Labor could order repayment of funds granted in 1975 and 1976 because he had been granted that authority in the 1973 CETA. The petitioner maintains that the Second Circuit's ruling was incorrect. At the very least, the question whether the Secretary received such authority in 1973 is a significant and important issue that should be decided by this Court.

The Court of Appeals found repayment authority in § 602(b) of the 1973 CETA, 87 Stat. 878, which authorized the Secretary to make "necessary adjustments in payments on account of overpayments or underpayments." The

Second Circuit relied in large part on this Court's decision regarding § 207(a)(1) of the Elementary and Secondary Education Act (ESEA) in *Bell v. New Jersey*, 461 U.S. 773 (1983).[2] Although § 602(b) of the 1973 CETA is somewhat similar to § 207(a)(1) of ESEA, there are significant differences in the provisions, and this Court's reasoning in *Bell* does not apply here.

One of the main concerns of this Court in *Bell* was that finding repayment authority in § 207(a)(1) of the 1965 ESEA would be improper because it would render the explicit repayment authority in the 1978 ESEA superfluous. *Bell*, 461 U.S. at 788-789. In *Bell*, the Supreme Court found that that would not be the case because the 1978 ESEA amendments were not meant to affect a radical change in the statute but merely to clarify the existing authority. *Id.* The Court went on to state that, in any event, the 1978 repayment provision would not be meaningless because it was different than the pre-1978 repayment provisions. In particular, it required the Secretary of Education to demand repayment. *Id.* at 788-789.

In CETA, the 1973 provision that the Second Circuit found to provide repayment authority, § 602(b), was re-

---

[2]Other Courts of Appeals have also used Bell to hold that the Secretary received repayment authority in the 1973 CETA. Atlantic County v. U.S. Department of Labor, 715 F.2d 834 (3rd Cir. 1983); Texarkana Metropolitan Area Manpower Consortium v. Donovan, 721 F.2d 1162 (8th Cir. 1983); North Carolina Commission of Indian Affairs v. U.S. Department of Labor, 725 F.2d 238 (4th Cir. 1984), *cert. denied*, — U.S. —, 105 S.Ct. 112 (1984); California Tribal Chairmen's Association v. U.S. Department of Labor, 730 F.2d 1289 (9th Cir. 1984); Mobile Consortium of CETA v. U.S. Department of Labor, 745 F.2d 1416 (11th Cir. 1984).

enacted in the 1978 CETA. *See* § 126(b) of the 1978 CETA, 92 Stat. at 1945. In addition, a separate explicit authority to seek repayment was a part of the 1978 CETA, § 106(d)(1), 92 Stat. at 1927. Under the Second Circuit's reasoning, there were therefore two provisions in the 1978 CETA that gave the Secretary repayment authority. Unlike the ESEA as interpreted in *Bell*, that duplication renders the later CETA repayment provision superfluous.

In contrast to the situation in *Bell*, Congress, in the 1978 amendments to CETA, felt it was making significant changes. As to sanctions, Representative Sarasin said:

> Of particular importance are the changes included in the bill to address the problems of abuse, fraud, waste, and mismanagement . . . [T]here improvements include strict *new* criminal and civil sanctions against prime sponsor and subcontractors for misuse of program funds.

(Emphasis added). 124 Cong. 25170; *see also,* 124 Cong. Rec. 25187, 27223. Interpreting § 602(b) of the 1973 CETA as authorizing repayment would mean that the 1978 CETA repayment section, § 106(d)(1), was not something new. Such an interpretation would, in fact, render the repayment authorization in § 106(d)(1) (if not all of the section) redundant. Unlike the ESEA 1978 repayment provision, 20 U.S.C. § 2835, the 1978 CETA counterpart, § 106(d)(1), could not be considered as changing or adding to the previous provision. It does not make the seeking of repayment mandatory. And, if the language of the 1973 provision, § 602(b), is interpreted as having given the Secretary of Labor significant authority over granted funds, the 1978 provision, § 106(d)(1), adds nothing to the Secretary's authority. In this instance, § 106(d)(1) would be made

superfluous. Section 602(b) cannot be interpreted so as to have that result. "A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another. . . ." Sands, *Sutherland Statutory Construction*, § 46.06 (4th ed.).

In response to petitioner's argument that the 1978 repayment authority would be redundant, the Second Circuit simply said that because strengthening the Secretary's enforcement powers was important, it was not surprising that in 1978 Congress chose to make the Secretary's power to order repayment express. App. at 30-31. That does not adequately address petitioner's argument because it does not explain why the 1978 Congress would also reenact the provision of the 1973 CETA that the Second Circuit found had already given the Secretary repayment authority. If the 1973 CETA provision, § 602(b), provided collection authority, then it was unnecessary for Congress to enact section 106(d)(1) in 1978. By the same token, because section 106(d)(1) of the 1978 CETA provided repayment authority, it was unnecessary for Congress to reenact § 602(b) unless that section had nothing to do with repayment.[3]

b. The 1978 CETA Should Not Be Applied Retroactively

Congress explicitly gave the Secretary authority to seek repayment in § 106(d)(1) of the 1978 CETA, 92 Stat.

---

[3]There are also significant differences in the legislative histories of CETA and ESEA. And, CETA does not contain provisions similar to those found to support this Court's ruling in *Bell*, 461 U.S. at 782-92.

1927. The CETA grants at issue in this case were, however, made before 1978. Assuming that the 1973 CETA did not provide repayment authority, the question is whether the explicit authority of the 1978 CETA can be applied retroactively. Because there are a number of pre-1978 grants that are still pending in the Department of Labor, this Court should address that issue.[4]

The question is a substantial one because the non-retroactivity of statutes in analogous situations appears to be well-settled. The general rule is that a statute will not be construed as retroactive unless such interest is clearly indicated. *See Greene v. United States*, 376 U.S. 149, 160 (1964). That rule has been found especially appropriate where a federal grant is involved. *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 17 (1981). Moreover, this Court has very recently held that the 1978 ESEA amendments should not be applied retroactively in determining whether funds were misused under that Act. *Bennett v. New Jersey*, — U.S. —, 105 S.Ct. 1555 (1985).

c. Even Assuming CETA Provided Repayment Authority, That Authority Has Been Lost

CETA was repealed by the Job Training Partnership Act of 1982 (hereafter JTPA). Act of October 13, 1982, § 184, 96 Stat. at 1357-58. It is petitioner's position that that repeal divested the Secretary of whatever authority or ability he may have had to seek repayment. This Court

---

[4]Because it found repayment authority in the 1973 CETA, the Second Circuit did not address the claim that the repayment provision in the 1978 CETA could not be applied retroactively.

should review that claim because of the number of pending instances in which the Secretary is still attempting to recover misspent CETA funds. *See* the United States' Petition for Writ of Certiorari in *Pierce County* at 16.

Generally, when a statute is repealed, rights and civil liabilities acquired and proceedings pending under the repealed statute are abrogated. Sands, *Sutherland Statutory Construction*, § 23.33 (4th ed.). Thus the effect of CETA's repeal was "to destroy the effectiveness of the repealed act *in futuro* and to divest the right to proceed under the statute, which, except as to proceedings past and closed, is considered as if it had never existed." *Id.*

The Second Circuit found otherwise in this case because of the transition provisions in § 181 (d) and (e) of the JTPA, 29 U.S.C. § 1591 (d) and (e). App. at 31-32. Those provisions state that the repeal of CETA will not affect orders or determinations issued on or before September 30, 1983 or proceedings pending on October 13, 1982.[5] It is petitioner's position, however, that those provisions only operate to save *Secretarial* determinations or proceedings based upon such determinations. And, because whatever repayment authority the Secretary may have had was discretionary and that discretion has not yet been exercised in this case,[6] the authority was lost with the repeal of CETA.

---

[5]The Grant Officer's final determination in this case was made on September 28, 1981 and the administrative proceedings were started on October 13, 1981.

[6]In other words, because the Secretary failed to exercise his discretion to order repayment before September 30, 1983 (in fact has not yet done so) there has been no order, determination or proceeding within the meaning of the savings provisions, 29 U.S.C. § 1591 (d) and (e).

CONCLUSION

For the reasons stated above, this Court should grant certiorari to review the decision of the Second Circuit Court of Appeals.

Respectfully submitted,

JEANNE S. WHITEING
Counsel of Record
Native American Rights Fund
1506 Broadway
Boulder, Colorado 80302
(303) 447-8760

RICHARD J. DAUPHINAIS
Native American Rights Fund
1712 "N" Street, N.W.
Washington, D.C. 20036
(202) 785-4166

Attorneys for the St. Regis Mohawk Tribe

December 2, 1985

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1258 — August Term, 1984

(Argued: May 22, 1985 Decided: July 17, 1985)

Docket No. 85-4042

ST. REGIS MOHAWK TRIBE, NEW YORK,
Petitioner,

—against—

WILLIAM E. BROCK, Secretary of Labor,
Respondent.

Before:

LUMBARD, FRIENDLY and PRATT, *Circuit Judges.*

Petition by the St. Regis Mohawk Tribe of New York to review a decision of the Secretary of Labor disallowing expenditures made in connection with two grants under the Comprehensive Employment and Training Act of 1973 and directing repayment of the disallowed expenditures out of non-CETA funds. Petition denied.

Richard J. Dauphinais, Native American Rights Fund, Boulder, Colorado (Jeanne S. Whiteing, Native American Rights Fund, Boulder, Colorado), *for Petitioner.*

Jeffrey A. Hennemuth, Attorney, U.S. Department of Labor, Office of the Solicitor, Washington, D.C. (William E. Brock, Secretary of Labor, Francis X. Lilly, Solicitor of Labor, Seth D. Zinman, Associate Solicitor for Legislation and Legal Counsel, William H. DuRoss, III, Associate Solicitor for Employment and Training, Harry L. Sheinfeld, Counsel for Litigation, U.S. Department of Labor, Office of the Solicitor, Washington, D.C. and Jonathan Kay, Office of the Regional Solicitor, U.S. Department of Labor, New York, New York), *for Respondent.*

FRIENDLY, *Circuit Judge*:

This is a petition by the St. Regis Mohawk Tribe of Indians (the Tribe) pursuant to 29 U.S.C. § 817(a)[1] to review a decision of the Secretary of Labor (the Secretary) which denied the Tribe's request for review of a decision and order of an Administrative Law Judge (ALJ). The ALJ's decision disallowed expenditures of $39,045.03 made by the Tribe in connection with two grants under the Comprehensive Employment and Training Act (CETA), 29 U.S.C. §§ 801-999 (as amended), and directed repayment of the disallowed expenditures out of non-CETA funds.

The Tribe is a small tribe of Indians located in northeastern New York near the Canadian border. Be-

[1] The Comprehensive Employment and Training Act was repealed in 1982 and is not contained in the 1982 edition of the United States Code; all citations in this opinion are to the Fifth Supplement to the 1976 edition printed in 1981.

ginning in 1975, it sought funds under CETA in order to become a prime sponsor of employment and training programs for tribal members, 97% of whom were at or below the poverty level. We are here concerned with Grant No. 99-6-522-30-127 (Grant No. 127), covering the period from September 15, 1975 to January 31, 1977, and Grant No. 99-6-522-30-54 (Grant No. 54), covering the period from October 1, 1976 to December 31, 1978. After modifications, a total of $273,503 was awarded under Grant No. 127, and a total of $1,012,830 was awarded under Grant No. 54.

The grants were audited in early 1978, and an exit conference upon completion of the audit was held on May 5, 1978. For Grant No. 127, expenditures of $5,351 were recommended for disallowance and expenditures of $16,255 were questioned, a total of $21,606. For Grant No. 54, which the audit reviewed only through September 30, 1977 (although with extensions the grant ran until the end of 1978), expenditures of $36,881 were recommended for disallowance and expenditures of $92,179 were questioned, a total of $129,060.

On November 18, 1980, the Director of the Grant and Audit Closeout Task Force in the Employment and Training Administration (the Grant Officer) issued an initial determination disallowing the entire $21,606 in expenditures made under Grant No. 127 that had been questioned or recommended for disallowance by the auditors. This initial determination was silent with respect to Grant No. 54. In January and June, 1981, the Tribe submitted additional information to the Department of Labor (the Department). On July 23, 1981, the Grant Officer issued a revised initial determination disallowing the same $21,606 under Grant No. 127 and adding to

this the $129,060 in expenditures questioned or recommended for disallowance by the auditors in connection with Grant No. 54. On September 28, 1981, nearly three-and-a-half years after the initial audit, the Grant Officer issued a final determination, disallowing only $68,334 in expenditures made under the two grants.

The Tribe filed a request for a hearing before an ALJ on October 13, 1981. The hearing was held on December 17, 1982, and additional briefing was completed in June, 1983. The ALJ did not issue a decision and order until January 4, 1985. He reduced the Grant Officer's disallowance to $39,045.03, and held that the Tribe was required to repay that sum to the Department out of non-CETA funds.

By letter dated January 30, 1985, the Tribe requested that the Secretary dismiss the case and set aside the ALJ's order on the grounds that the final determination of the Grant Officer had been untimely under § 106(b) of CETA and the regulations promulgated thereunder, 20 C.F.R. §§ 676.86, .88. The Secretary declined to accept the case for review, and, pursuant to 20 C.F.R. § 676.91 (f), the ALJ's decision and order became the final order of the Secretary. The Tribe was formally notified of the denial of review by the Secretary in a letter dated March 1, 1985, and this petition to review followed. We deny the petition.

Discussion

The Tribe does not dispute the merits of the finding that it misused CETA funds in the amount of $39,045.03. Rather, it asserts that the Secretary cannot recover these because of two principal legal barriers which we will now discuss.

I. *The 120-Day Period for a Final Determination*

The Tribe argues that "collection is outside of the Secretary's jurisdiction because he failed to issue his Final Determination within 120 days of receipt of the audit" as required by § 106(b) of CETA, 29 U.S.C. § 816(b), and the Secretary's regulations thereunder, 20 C.F.R. § 676.88. The statute, as substantially revised in the CETA Amendments of 1978, Pub. L. No. 95-524, 92 Stat. 1909, 1926, provides (emphasis added):

> Whenever the Secretary receives a complaint from any interested person or organization . . . which alleges, or whenever the Secretary has reason to believe (because of an audit, report, on-site review, or otherwise) that a recipient of financial assistance under this Act is failing to comply with the requirements of this Act, the regulations under this Act or the terms of the comprehensive employment and training plan, the Secretary shall investigate the matter. *The Secretary shall conduct such investigation, and make the final determination required by the following sentence regarding the truth of the allegation or belief involved, not later than 120 days after receiving the complaint.* If, after such investigation, the Secretary determines that there is substantial evidence to support such allegation or belief that such a recipient is failing to comply with such requirements, the Secretary shall, after due notice and opportunity for a hearing to such recipient, determine whether such allegation or belief is true.

The Secretary's regulations amplify the emphasized sentence as follows:

Final determination. If all the parties and the Grant Officer cannot informally resolve any matter pursuant to paragraph (d), the Grant Officer shall, not later than 120 days after the filing of the complaint (or receipt of a final audit or investigation report in the absence of a complaint), provide each party with a final written notice in duplicate by certified mail, return receipt requested, that (1) indicates that efforts to informally resolve matters contained in the initial determination pursuant to paragraph (a) have been unsuccessful, (2) lists those matters upon which the parties continue to disagree, (3) lists any sanctions, and required corrective actions, including any other alteration or modification of the plan, grant, agreement or program intended by the Grant Officer, and (4) informs the parties of their opportunity to request a hearing pursuant to these regulations. The Grant Officer shall also mail a copy of his final determinations to any parties in interest.

20 C.F.R. § 676.88(e). The Secretary does not dispute that the audit report was received by the Department more than 120 days before the date of the Grant Officer's final determination of July 23, 1981, but maintains that this does not bar the Government from recovering misspent funds.

The proposition advanced by the Tribe, that Congress meant to bar the Government from recovering funds provided by United States taxpayers and misspent by a grantee unless the Secretary succeeds in making a final determination within the short period of 120 days from the time he first receives information raising the possibility of misuse, is not, to say the least, of the sort that

commands instant assent.[2] Despite its acceptance by two courts of appeals, *see Lehigh Valley Manpower Program* v. *Donovan*, 718 F.2d 99 (3 Cir. 1983); *City of Edmonds* v. *United States Dep't of Labor*, 749 F.2d 1419 (9 Cir. 1984); *Pierce County* v. *United States Dep't of Labor*, Nos. 83-7504, 83-7505 (9 Cir. May 7, 1985), we must subject it to most careful scrutiny.[3]

Although § 106(b) states that the Secretary "shall" issue his final determination within 120 days, it does not specify the consequence of his failure to do so. The Tribe argues that anything less than a complete bar on further administrative action is inconsistent with Congress' use of the verb "shall"; any other interpretation, the Tribe argues further, would render the 120-day deadline unenforceable and hence meaningless. The Secretary responds that interpreting the 120-day deadline as a limitation on the Secretary's authority is inconsistent with the "broad remedial intent of the CETA Amendments of 1978," which added § 106(b). According to the Secretary, enforcement of the 120-day provision is limited to the right of an interested party to compel the Grant Officer to complete his investigation forthwith or to force the Department to proceed immediately with an administrative hearing.

The Tribe puts on the word "shall" a weight it cannot bear in the present context. In numerous cases

---

[2] The regulations encourage informal resolution of disputes, *see* 20 C.F.R. § 676.88(d), and the regulation previously quoted, which implements the 120-day deadline, requires that the Grant Officer's final determination include a statement that such efforts have been unsuccessful, *id.* § 676.88(e)(1).

[3] In a letter submitted to the Court after the argument, the Government estimated that $109,225,621 in audited and disallowed costs might be lost to the Government if the view of the Third and Ninth Circuits were adopted nationwide.

construing similar statutes directing that administrative action "shall" be completed within a specified time, courts have enunciated a general rule that

> [a] statutory time period is not mandatory unless it *both* expressly requires an agency or public official to act within a particular time period *and* specifies a consequence for failure to comply with the provision.

Fort Worth Nat'l Corp. v. *Federal Savings & Loan Ins. Corp.*, 469 F.2d 47, 58 (5 Cir. 1972) (construing 12 U.S.C. § 1730a(e)) (emphasis added); *see also Maryland Casualty Co.* v. *Cardillo*, 99 F.2d 432, 434 (D.C. Cir. 1938) (construing 33 U.S.C. § 919); *Usery* v. *Whitin Mach. Works, Inc.*, 554 F.2d 498, 501 (1 Cir. 1977) (construing 19 U.S.C. § 2273(a)); *Marshall* v. *Local Union No. 1374*, 558 F.2d 1354, 1357 (9 Cir. 1977) (construing 29 U.S.C. §482(b)); *Thomas* v. *Barry*, 729 F.2d 1469, 1470 n.5 (D.C. Cir. 1984) (construing Home Rule Act, Pub. L. No. 93-198, 87 Stat. 774 (1973)) (dictum); *Diamond Match Co.* v. *United States*, 181 F. Supp. 952, 958-59 (Cust. Ct. 1960) (construing 19 U.S.C. § 1516(c)); *Alberta Gas Chems., Inc.* v. *United States*, 515 F. Supp. 780, 784-86 (U.S. Ct. Int'l Trade 1981) (construing 19 U.S.C. § 160(c)(1); *United States* v. *Log Mountain Mining Co.*, 550 F. Supp. 811, 815 (E.D. Tenn. 1982) (construing 30 U.S.C. § 1268(c)).[4] Such decisions are

---

[4] The principle enunciated in these cases goes back at least as far as *French* v. *Edwards*, 80 U.S. (13 Wall.) 506, 511 (1871), where, construing a statute authorizing sale of only as much of a taxpayer's property as was necessary to enforce a tax lien, the Court stated:

> There are undoubtedly many statutory requisitions intended for the guide of officers in the conduct of business devolved upon them, which do not limit their power or render its exercise in disregard of the requisitions ineffectual. Such generally are regulations designed to secure order,

[Footnote continued on following page]

particularized applications of "the great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided . . . ." *United States* v. *Nashville, C. & St. L. Ry.*, 118 U.S. 120, 125 (1886); *see also United States* v. *Thompson*, 98 U.S. 486, 489 (1878) ("It was deemed important that, while the sovereign was engrossed by the cares and duties of his office, the public should not suffer by the negligence of his servants"); *Stanley* v. *Schwalby*, 147 U.S. 508, 515 (1893) (quoting *United States* v. *Hoar*, F. Cas. No. 15,373 at 330 (Story, J.) ("The true reason, indeed, why the law has determined that . . . no delay should bar [the sovereign's] right . . . is to be found in the great public policy of preserving the public rights, revenues and property from injury and loss, by the negligence of public officers")); *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 132 (1938).

The legislature will not be deemed to have departed from this policy unless it clearly says so. Section 106(b) does not state that failure to issue a final determination within 120 days of the complaint bars further action by the Secretary challenging the sponsor's use of CETA funds, and thus, under the rule recognized in the cases cited above, should not be interpreted to impose this consequence in the absence of persuasive extrinsic evidence that Congress so intended. *Cf. Usery* v. *Whitin Mach. Works, Inc.*, *supra*, 554 F.2d at 500-03; *National*

[Footnote continued from previous page]

> system, and dispatch in proceedings, and by a disregard of which the rights of parties interested cannot be injuriously affected. Provisions of this character are not usually regarded as mandatory unless accompanied by negative words importing that the acts required shall not be done in any other manner or time than that designated.

Cable Television Ass'n v. *Copyright Royalty Tribunal*, 724 F.2d 176, 189 n.23 (D.C. Cir. 1983) (construing 17 U.S.C. § 804(e)); *Alberta Gas Chems., Inc., supra*, 515 F. Supp. at 784-86. *See also United States* v. *Morris*, 252 F.2d 643, 649 (5 Cir. 1958) (construing statutorily authorized Migrant Labor Agreement); *Ralpho* v. *Bell*, 569 F.2d 607, 626-28 (D.C. Cir. 1977) (construing 50 U.S.C. App. § 2019b(e)). Inquiry into the legislative history of CETA discloses no such evidence; to the contrary, it significantly strengthens the conclusion that failure to meet the 120-day provision in § 106(b) was not intended to bar later action by the Secretary to recover misused Government funds.

Concern with the adequacy of the Department's oversight of misuse of CETA funds by prime sponsors was prevalent during the consideration of the CETA Amendments of 1978, and the general theme of improving enforcement mechanisms was an important one in the committee hearings. *See, e.g., Comprehensive Employment and Training Act Amendments of 1978: Hearings on S. 2570 Before the Subcomm. on Employment, Poverty and Migratory Labor of the Senate Comm. on Human Resources*, 95th Cong. 2d Sess. 591 (letter from Ray Marshall, Secretary of Labor, to Sen. Nelson), 749 (testimony of Tiny Wells, AFSCME), 1329 (statement of William Welsh, AFSCME), 1526 (statement of Ann Schmitt, Director, Women's Lobby) (1978) [hereinafter cited as Senate Hearings]; *Department of Labor Monitoring of Manpower Programs for the Hard to Employ: Hearings Before the Subcomm. on Manpower and Housing of the House Comm. on Government Operations*, 95th Cong., 2d Sess. 83-85 (testimony of Thomas Komarek, Acting Regional Administrator, Department of Labor), 451 (statement of Rep. Collins, Committee Chairwoman),

564-65 (testimony of Art Lewis, Executive Director, Wayne County prime sponsor), 744-45 (statement of Rep. Maguire), 746-79 (testimony of Ernest Green, Assistant Secretary, Department of Labor) (1978) [hereinafter cited as House Hearings]. Discussion of preventing abuse by prime sponsors was equally prevalent in the floor debates on the bill. *See, e.g.*, 124 Cong. Rec. 25,168 (statement of Rep. Hawkins), 25,221-22 (statement of Rep. Cornell), 25,238 (statement of Rep. Anderson), 25,243 (statement of Rep. Maguire), 27,244 (statement of Sen. Domenici), 27,803 (statement of Sen. Schweiker), 27,825 (statement of Sen. McClure). Consequently, significant additions to CETA were made both by the congressional committees and on the floor of the Congress, and, as finally enacted, the 1978 Act included numerous new anti-abuse provisions. *E.g.*, § 3(a), 18 U.S.C. § 665 (a) (criminal sanctions); § 106, 29 U.S.C. § 816 (administrative complaints and sanctions); § 123(g), 29 U.S.C. § 825(g) (administrative authority to establish regulations to prevent abuses such as nepotism, kickbacks, inadequate recordkeeping, commingling of funds); § 134, 29 U.S.C. § 836 (bonding requirement for fund recipients). According to the Senate Report:

> The committee believes that all of these provisions, taken together, will work to insure that program abuses are deterred, exposed, and corrected. The committee considers it a serious matter for persons to spend these funds, or to allow these funds to be spent in ways not authorized by Congress, thus impairing the Nation's effort to effectively help those intended to be assisted under this act. The committee expects the Secretary and the Attorney General to take prompt and decisive steps to remedy abuses whenever and at whatever level and place they occur.

S. Rep. No. 891, 95th Cong., 2d Sess. 43 (1978), *reprinted in* 1978 U.S. Code Cong. & Ad. News 4480, 4523. The overriding goal was to insure that "the Secretary should have maximum authority to protect the integrity of the program." S. Rep. No. 891, *supra*, at 21, 1978 U.S. Code Cong. & Ad. News at 4501; *see also id.* at 42-43, 1978 U.S. Code Cong. & Ad. News at 4522-23; H.R. Rep. No. 1124, 95th Cong., 2d Sess. 3, 13 (1978).

One problem disclosed in the committee hearings was the difficulty experienced by participants, subgrantees, contractors and other interested persons in having complaints about prime sponsors' failure to meet CETA grant conditions resolved within a reasonable time. *See, e.g.*, Senate Hearings, *supra*, at 1329 (statement of Williams Welsh), 1526 (statement of Ann Schmitt); House Hearings, *supra*, at 753-65 (testimony of Rocco DeMarco, Director, Office of Special Investigations, Department of Labor, and Lawrence Rogers, Director, Office of Field Operations, Department of Labor). Although the 1973 CETA contemplated investigation by the Secretary of "formal allegations" made by interested parties, § 108 (b)(2), 87 Stat. 847, it did not spell out procedures for a complaint process, and the procedures established in the regulations provided no time limits for filing or processing complaints, *see* 29 C.F.R. §§ 98.42-.48 (1977). The result, as summarized by the Senate Committee, was that "[i]n some cases grievances have been either ignored, or there has been interminable delay in their resolution." S. Rep. No. 891, *supra*, at 42, 1978 U.S. Code Cong. & News at 4522. To cure this, the Senate added § 106(a) to the bill. Subparagraph (1) required each prime sponsor to "establish and maintain a grievance procedure, . . . for handling complaints about the program arising from its participants, subgrantees and contractors, or from other

interested persons." The Secretary was directed to promulgate regulations "to ensure that a [prime sponsor] shall make a determination as to the merits of a complaint within 60 days after receipt of such complaint." Subparagraph (2) authorized an appeal to the Secretary and imposed a time limit on his resolution of the complaint as well:

> Whenever the Secretary receives a complaint from any interested person who, or organization which, has exhausted the recipient's grievance system established pursuant to paragraph (1), or other information including findings of other agencies or courts, that a recipient of financial assistance under the Act is failing to comply with the requirements of the Act, the regulations under the Act, or the terms of the comprehensive employment and training plan, the Secretary shall investigate the matter and make a determination within one hundred twenty days as to the validity of a complaint or the extent and degree of noncompliance by a recipient.

The 120-day deadline thus originated as part of a provision whose purpose was to benefit the victims of prime sponsor non-compliance with CETA. *See also* S. Rep. No. 891, *supra*, at 15-16, 42-43, 80, 1978 U.S. Code Cong. & Ad. News at 4495, 4522-23, 4560. It was not designed to give prime sponsors immunity for misuse of CETA funds unless there was a final determination within 120 days.

Like the Senate bill, the House Committee bill required prime sponsors to set up formal grievance procedures; the House Committee bill also required the Secretary to act "whenever the Secretary has reason to believe (because of an audit, report, on-site review, or

otherwise) that a recipient of financial assistance under this Act is failing to comply with the requirements of this Act . . ." as well as after an appeal from a grievance denied by the prime sponsor. However, unlike the Senate's version, the House Committee bill did not impose fixed deadlines for making determinations on the merits of grievances filed pursuant to the new procedures.[5] The 120-day deadline for action by the Secretary was added in a floor amendment proposed by Representative Obey which added to the House version of § 106 deadlines like those in the Senate's version: the language in § 106(a) of the House Committee bill requiring that decisions by prime sponsors on grievances be "promptly made" was replaced by a requirement that such decisions be made within 60 days, and the sentence requiring a determina-

---

[5] The House Committee version provided in § 106:

(a) Each recipient of financial assistance under the Act shall establish and maintain a grievance procedure, including provisions for hearings within 30 days after filing of a grievance, for handling complaints about the program arising from its participants, subgrantees, and contractors, and other interested persons. Hearings shall be conducted expeditiously and decisions shall be promptly made. With the exception of grievances alleging fraud or any criminal activity, filing of a grievance must be made within one year of the alleged occurrence.

(b) Whenever the Secretary receives a complaint from any interested person or organization (which has exhausted the prime sponsor's grievance system established pursuant to subsection (a)) which alleges, or whenever the Secretary has reason to believe (because of an audit, report, on-site review, or otherwise) that a recipient of financial assistance under this Act is failing to comply with the requirements of this Act, the regulations under this Act, or the terms of the comprehensive employment and training plan, the Secretary shall investigate the matter. If, after such investigation, the Secretary determines that there is substantial evidence to support such allegations or belief that such a recipient is failing to comply with such requirements, the Secretary shall, after due notice and opportunity for a hearing to such recipient, determine whether such allegation or belief is true.

tion by the Secretary not more than 120 days after receipt of the complaint was inserted in § 106(b). 124 Cong. Rec. 25,230. It is noteworthy that, while the unamended version of § 106(b) imposed a duty on the Secretary to investigate *either* upon receipt of a complaint *or* when he has reason to believe from other sources that there has been a violation of CETA, Representative Obey's amendment referred only to "receiving the complaint," an omission entirely consistent with the primary reason for imposing a deadline—to assure complainants a prompt resolution of their complaints. That the running of the deadline was not intended to let non-complying prime sponsors escape the consequences of their non-compliance is made unmistakably clear from the discussion on the floor of the House:

> Mr. OBEY. Mr. Chairman, I understand that this amendment will be accepted by the committee. It is a very simple amendment. All it does is to put a specific period of time in the bill during which the prime sponsor must answer a complaint lodged against it for violations of the conditions under which the CETA program exists in the first place, and also it establishes a 120-day time limit on the time during which the Labor Department can consider a complaint before it has to proceed.
>
> Mr. HAWKINS. Mr. Chairman, will the gentleman yield?
>
> Mr. OBEY. I yield to the gentleman from California (Mr. HAWKINS).
>
> Mr. HAWKINS. Mr. Chairman, we have seen the amendment. We accept the amendment.
>
> *If the gentleman would further yield, do I understand from the gentleman from Wisconsin (Mr.*

OBEY) that if the determination is not made in a specified time it shall not affect the Secretary's jurisdiction in the matter?

Mr. OBEY. That is correct.

Mr. HAWKINS. With that understanding we do accept the amendment.

124 Cong. Rec. 25,230-31 (emphasis supplied).[6]

The bills passed by the House and Senate differed in numerous respects, leading to a conference. 124 Cong. Rec. 31,059, 33,078. The conference agreed on a version of § 106 which, with differences that are not pertinent here, adopted the House version of § 106(b), including the Obey amendment. The conferees issued an identical statement to both Houses of Congress which simply describes the provision and does not indicate that any substantive change was thought to have been made at the conference. *See* H.R. Conf. Rep. No. 1765, 95th Cong., 2d Sess. 117, 123 (1978), *reprinted in* 1978 U.S. Code Cong. & Ad. News 4581, 4588; S. Conf. Rep. No. 1325, 95th Cong., 2d Sess. 117, 123 (1978).[7]

---

[6] Representative Hawkins was among the sponsors of the House bill to amend the 1973 CETA, a member of the committee to which the bill was referred and the floor manager during the House debate.

[7] The Conference Report explained:

> The conference agreement provides that each recipient of funds under the Act shall establish formal and informal grievance procedures for resolving complaints pertaining to the conditions and terms of employment of CETA participants employed by such recipient. Prime sponsors would establish grievance procedures for resolving complaints pertaining to the terms and conditions of employment of CETA participants employed by the prime sponsor as well as any other complaint about the program arising from its participants, subgrantees, contractors or other interested parties.

[Footnote continued on following page]

The decisions of the Third and Ninth Circuits cited above, *Lehigh Valley Manpower Program*, *supra*, 718 F.2d 99, *City of Edmonds*, *supra*, 749 F.2d 1419, and *Pierce County*, *supra*, No. 83-7504, slip op., holding that under § 106(b) the Secretary has no authority to seek repayment more than 120 days after he learns of a possible violation, do not persuade us. The Third Circuit failed to consider the many cases, cited at the outset of our discussion, holding that a statutory time period requiring that administrative action be taken within a certain time does not bar later action by the Government unless the statute makes clear that this shall be the consequence. Indeed, as shown in detail in the margin,[8] none of the cases cited in Judge Weis' opinion for the Third Circuit to support the holding that further administrative action was barred dealt with the question

---

[Footnote continued from previous page]

> Recipients of funds under the Act and national contractors would resolve a complaint within 60 days of its receipt. Upon exhaustion of local remedies, a complainant would be premitted [sic] appeal to the Secretary of Labor who would make a determination on the validity of the complaint within 120 days of its receipt.

H.R. Conf. Rep. No. 1765, *supra*, at 123, 1978 U.S. Code Cong. & Ad. News at 4588.

[8] Three of the five cases cited, *United States* v. *Nixon*, 418 U.S. 683, 695-96 (1974); *Kelly* v. *Railroad Retirement Bd.*, 625 F.2d 486, 491-92 (3 Cir. 1980); and *Neal* v. *Secretary of Navy*, 639 F.2d 1029, 1035-36 (3 Cir. 1981), did not involve statutory deadlines at all. The two remaining cases, *Mohasco Corp.* v. *Silver*, 447 U.S. 807, 815-26 (1980) (failure of discharged employee to file claim with EEOC within the 300 days required by § 706(e) of the Civil Rights Act of 1964 bars claim); and *School District of City of Allentown* v. *Marshall*, 657 F.2d 16, 19-21 (3 Cir. 1981) (failure of employee to file complaint with the Secretary of Labor alleging retaliation by employer in violation of the Toxic Substances Control Act within the 30 days prescribed by 15 U.S.C. § 2622(b) bars claim), did involve statutory deadlines, but in both the party held to be barred by the failure to take timely action was an aggrieved individual and not a Government agency.

here presented—the effect of a time limit on administrative action by the sovereign. The Third Circuit opinion also made no reference to the critical exchange between Representatives Hawkins and Obey on the floor of the House wherein Representative Obey's amendment was accepted only on the understanding "that if this determination is not made in a specified time it shall not affect the Secretary's jurisdiction in the matter."

The Ninth Circuit, on the other hand, did consider the rule that a statutory deadline does not bar action by the Government unless it so specifies, citing its own decision in *Marshall* v. *Local Union No. 1374*, *supra*, 558 F.2d at 1357, and *Fort Worth Nat'l Corp.*, *supra*, 469 F.2d at 58. It concluded that these decisions had been overruled "*sub silentio*" by the Supreme Court in *Mohasco Corp.*, *supra*, 447 U.S. at 825-26. *City of Edmonds*, *supra*, 749 F.2d at 1423. However, as previously pointed out, in *Mohasco* an aggrieved individual and not a Government agency was barred by failure to take timely action; the principle that disfavors sacrificing the public interest because of the negligence of public officers thus was not applicable. While the Ninth Circuit opinion also considered the discussion between Representatives Hawkins and Obey, Judge Alarcon concluded:

> We are not persuaded by the Department of Labor's reliance on Congressman Obey's comments that we should abandon our judicial responsibility to give plain mandatory language its ordinary meaning. We see no principled reason to create an intercircuit conflict on the meagre showing made by the Department of Labor in support of its reading of section 816(b).

749 F.2d at 1422. To the contrary, in our view, the

language of the statute does *not* mandate dismissal of an action by the Secretary to recover misused funds because a final determination was not made within 120 days; the statute does not specify what the consequences of such a failure shall be, and the long recognized rule, not altered by *Mohasco*, is that under such circumstances later action is not barred. While this would be sufficient, inquiry into the legislative history shows that the primary purpose of the deadline was to insure an expeditious remedy for CETA program *beneficiaries* who had been denied CETA benefits due to misuse of funds by prime sponsors, and that one House of Congress stipulated that the deadline should not affect the Secretary's jurisdiction.[9] Under such circumstances, as in *Usery* v. *Whitin Mach. Works, Inc., supra,* 554 F.2d at 503, "[i]t would be ironic indeed," to hold that Congress' concern for speedy resolution of complaints was to be at the expense of the persons for whose benefit § 106(b) was enacted.[10]

---

[9] Indeed, if one looked only at the language of § 106(b), as illuminated by the legislative history, it could be strongly argued that the 120-day provision has no application at all to an investigation of a prime sponsor at the instance of the Secretary: the 120-day provision runs only from receipt of "the complaint," and the first sentence of § 106(b) uses the word "complaint" only in connection with complaints from outsiders, and in contradistinction to "whenever the Secretary has reason to believe (because of an audit, report, on-site review or otherwise)" that a prime sponsor has violated CETA's requirements. However, the regulations promulgated by the Secretary have applied the 120-day deadline in § 106(b) to "receipt of a final audit or investigative report in the absence of a complaint," 20 C.F.R. § 676.88(e). Agreeing in this respect only with *Lehigh Valley Manpower Program* v. *Donovan, supra,* 718 F.2d at 101, and *Pierce County* v. *United States Dep't of Labor, supra,* slip op. at 6, we accept this as a reasonable interpretation of the statute. Of course, the Secretary's interpretation of the deadline as applicable to investigations triggered by audits as well as by outsiders' complaints does not heighten the effect of the deadline.

[10] *Usery* involved the Trade Act of 1974, under which workers

[Footnote continued on following page]

II. *The Secretary's Authority to Order Repayment as a Remedy*

The Tribe argues that if the Secretary's finding of its use of grant moneys in violation of CETA was not time-barred, the portion of his order directing repayment still cannot stand. This contention rests on two propositions: (1) that the Secretary had no authority under the 1973 CETA to order direct repayment by prime sponsors from non-CETA funds, his remedy being restricted to offsetting disallowed expenses against future CETA payments, and (2) that the provisions of the 1978 CETA which expressly authorized him to order repayment [11]

[Footnote continued from previous page]

laid off because of the increased importation encouraged by the Act qualified for economic assistance. The court was called upon to decide whether the Secretary's failure to determine eligibility within the 60 days which § 223 of the Act, 19 U.S.C. § 2273(a), states that the determination "shall" be made, precluded further action by the Secretary to obtain information relating to eligibility from an employer. Chief Judge Coffin concluded that "the Secretary is not ousted of jurisdiction by reason of his failure to make an eligibility determination within 60 days . . . ." *Id.* at 503. After stating the rule that a statutory deadline does not bar the Government unless it expressly specifies this consequence, *id.* at 501, Chief Judge Coffin found that "[t]he contrary result . . . is not only inconsistent with established principles; it produces a result which we find impossible to square with the remedial objectives of the Act," *id.* at 502.

[11] The 1978 Act provided in § 106(d), 29 U.S.C. § 816(d) (emphasis added):

> (1) If the Secretary concludes that any recipient of funds under this Act is failing to comply with any provision of this Act or the regulations under this Act or that the recipient has not taken appropriate action against its subcontractors, subgrantees, and other recipients, the Secretary shall have the authority to terminate or suspend financial assistance in whole or in part and order such sanctions or corrective actions as are appropriate, *including the repayment of misspent funds from sources other than funds under this Act* and the withholding of future funding, if prior notice and an

[Footnote continued on following page]

should not be applied retroactively to grants which, like these here at issue, were made prior to 1978. The Secretary contends that he did have authority to order repayment under the 1973 Act, and, alternatively, that he has a common-law right to recover misspent funds in CETA administrative proceedings. Since we hold there was authority to order direct repayment under the 1973 Act, we need not reach the issues of the 1978 Act's retroactivity or the Government's common-law rights.

Relying on *Bell* v. *New Jersey*, 461 U.S. 773 (1983), the Secretary finds statutory authority to order repayment in the language of § 602(b) of the 1973 CETA, 87 Stat. 878, which authorizes him to make "necessary adjustments in payment on account of overpayments and

---

[Footnote continued from previous page]

opportunity for a hearing have been given to the recipient. Whenever the Secretary orders termination or suspension of financial assistance to a subgrantee or subcontractor (including operators under a nonfinancial agreement), the Secretary shall have authority to take whatever action is necessary to enforce such order, including action directly against the subgrantee or subcontractor, and an order to the primary recipient that it take such legal action, to reclaim misspent funds or to otherwise protect the integrity of the funds or ensure the proper operation of the program.

(2) If the Secretary concludes that a public service employment program is being conducted in violation of section 121(e)(2), (e)(3), (g)(1), section 122(c), (e), or section 123(g), or regulations promulgated pursuant to such sections, *the Secretary shall, pursuant to paragraph (1) of this subsection, terminate or suspend financial assistance in whole or in part, order the repayment of misspent funds from sources other than funds under this Act or other funds used in connection with programs funded under this Act (unless, in view of special circumstances as demonstrated by the recipient, the Secretary determines that requiring repayment would not serve the purposes of attaining compliance with such sections), and order such other sanctions or corrective actions as are appropriate.*

underpayments." [12] In *Bell*, the Secretary of Education sought repayment from the States of New Jersey and Pennsylvania for misuse of federal grants under the Elementary and Secondary Education Act (ESEA), Pub. L. No. 89-10, 79 Stat. 27 (1965), 20 U.S.C. § 2701-3386 (as amended). ESEA created a program to improve educational opportunities for disadvantaged children that is similar to CETA in many respects: local educational agencies obtain grants from state agencies, which, in turn, obtain grants from the Department of Education upon providing assurances that the local agencies will spend the funds only on qualifying programs. As originally enacted, ESEA, like CETA, did not expressly provide for the repayment of misspent funds, but did provide that in disbursing payments under the Act the Secretary should

> take into account the extent (if any) to which any previous payment to such State educational agency under this title (whether or not in the same fiscal year) was greater or less than the amount which should have been paid to it.

---

[12] In its entirety, § 602(b) provided:

> The Secretary may make such grants, contracts, or agreements, establish such procedures (subject to such policies, rules, and regulations as he may prescribe), and make such payments, in installments and in advance or by way of reimbursement, or otherwise allocate or expend funds made available under this Act, as he may deem necessary to carry out the provisions of this Act, including (without regard to the provisions of section 4774(d) of title 10, United States Code) expenditures for construction, repairs, and capital improvements, and including necessary adjustments in payments on account of overpayments or underpayments. The Secretary may also withhold funds otherwise payable under this Act, but only in order to recover any amounts expended in the current or immediately prior fiscal year in violation of any provision of this Act or any term or condition of assistance under this Act.

§ 207(a)(1), 79 Stat. 32 (quoted in *Bell, supra*, 461 U.S. at 782). Congress amended ESEA in 1978, as it amended CETA, and made explicit the Secretary's authority to recover funds misused by a recipient. *See* Education Amendments of 1978, Pub. L. No. 95-561, § 185(b), 92 Stat. 2143, 2190 (codified at 20 U.S.C. § 2835(b)). The States challenged the Secretary's authority to recover funds misspent between 1967 and 1973, arguing, like appellant here, that no authority to demand repayment existed prior to 1978 and that the 1978 amendments operated prospectively only.

The Court, in an opinion by Justice O'Connor, readily ruled in favor of the Government. She found that "[t]he plain language of the statute recognizes the [Government's] right" to recover misspent funds because no other plausible reading would explain the meaning of the statutory command to "take into account the extent (if any) to which any previous payment" was too large. *Id.* at 783 & n.8.[13] She examined the legislative history and concluded that it "supports this natural reading." *Id.* at 783-84 & n.9. Justice O'Connor also placed reliance on the fact that "[t]he Department [of Education] has long held our view of the statute, for it often sought repayment of misused funds." *Id.* at 786-87. Finally, she relied for "persuasive value" on the support of later Congresses, placing particular emphasis on statements from the legislative history of the 1978 amendments to

---

[13] The State of New Jersey argued that this language only entitled the Secretary to reduce grants below the amount that the State would be eligible to receive while the State undertook a smaller program. The Court rejected this argument, noting that "it is hardly likely that Congress intended disadvantaged children to suffer twice: once when the State misspent the funds and once when the State cancels an otherwise eligible program because of the Secretary's refusal to fund it." 461 U.S. at 783 n.8.

ESEA that reflected the understanding that authority to order repayment already existed. *Id.* at 785, 789-90. In response to the States' argument that this interpretation of the earlier provisions of ESEA rendered the 1978 amendment redundant, Justice O'Connor explained that the 1978 amendments were intended to clarify the Secretary's authority by "specifying the procedures to be followed in the determination of the amount of the debt and in the collection of the debt." *Id.* at 788-89.[14]

Relying on *Bell*, the Third Circuit in *Atlantic County* v. *United States Dep't of Labor*, 715 F.2d 834, 836 (3 Cir. 1983) (per curiam), and the Fourth Circuit in *North Carolina Comm'n of Indian Affairs* v. *United States Dep't of Labor*, 725 F.2d 238, 240-41 (4 Cir.), *cert. denied*, 105 S. Ct. 112 (1984), concluded that the Secretary had authority to order direct repayment of misspent funds under the 1973 CETA. These decisions were followed in *Texarkana Metropolitan Area Manpower Consortium* v. *Donovan*, 721 F.2d 1162, 1164 (8 Cir. 1983) (per curiam); *California Tribal Chairman's Ass'n* v. *United States Dep't of Labor*, 730 F.2d 1289, 1291 (9 Cir. 1984); *Mobil Consortium of CETA Alabama* v. *United States Dep't of Labor*, 745 F.2d 1416, 1418 (11 Cir. 1984). None of these cases dealt with an argument, which also has not been made by the Tribe here, that could have been made on the basis of footnote 4 of the *Bell* opinion, which we quote in the margin,[15] that *Bell*

---

[14] Justice White, concurring, joined the Court's opinion, but stated that he would have preferred to place decision on the ground that the 1978 amendments should be applied retroactively. 461 U.S. at 793-94.

[15] New Jersey seems to take the view that the Secretary has settled the method of collection by demanding repayment. In fact, the record shows that each State received notice of

[Footnote continued on following page]

addressed only the question whether the Government had a *right* under ESEA to recover misspent funds and not the available *remedies*. *Cf. Maryland Dep't of Human Resources* v. *Department of Health and Human Services*, No. 83-2344, slip op. at 23-41 (D.C. Cir. June 7, 1985) (finding that *Bell* does not include remedies available in context of misspent federal grants under title XX of the Social Security Act). However, any possible doubt on that score was dispelled when the Supreme Court, again speaking through Justice O'Connor, approved a repayment order by the Department of Education for misspending ESEA funds provided in 1974. *Bennett* v. *Kentucky Dep't of Education*, 53 U.S.L.W. 4332 (U.S. March 19, 1985).[16]

[Footnote continued from previous page]

the Board's decision, stating: "[The State] should refund [the amount] to the Department of Education. Appropriate authorities within the Department will be in touch with you at an early date to discuss the method of repayment of the funds in question."

New Jersey has reproduced as an appendix to its brief a letter demanding immediate repayment, suggesting that the Secretary has already determined the manner of collection. That letter is not part of the record, and we are inclined, in any event, to view it as an initial proposal of a means of collection. Cf. 4 CFR § 102.2 (1983) (regulation under Federal Claims Collection Act, Pub. L. 89-508, § 3, 80 Stat. 309, 31 U.S.C. § 952, requiring agency to make written demand for repayment in attempting collection of claims). Moreover, the Secretary, who is the petitioner, has not asked us to decide what means of collection are available to him, but only whether he is a creditor. *Since the case does not present the issue of available remedies, we do not address it.*

461 U.S. at 779 n.4 (citations omitted) (emphasis added).

[16] The issue in *Bennett* v. *Kentucky Dep't of Education* was whether bad faith on the part of the State was required before the Secretary could seek recovery of misspent funds. In finding that it was not, Justice O'Connor did not discuss the use of repayment as opposed to some other remedy, and apparently assumed that a repayment order was proper. Obviously she was

[Footnote continued on following page]

Even without *Bell* and *Bennett*, the history and administrative background of the 1973 Act require the conclusion that the Secretary had authority under the 1973 CETA to order repayment of misspent funds by prime sponsors. CETA replaced the Manpower Development and Training Act, Pub. L. No. 87-415, 76 Stat. 23 (1962), the Economic Opportunity Act of 1964, Pub. L. No. 88-452, 78 Stat. 508 (1964), and the Emergency Employment Act of 1971, Pub. L. No. 92-45, 85 Stat. 146 (1971). *See* 1973 CETA, § 3, 87 Stat. 839. Like the 1973 CETA, these earlier acts contained no provisions expressly authorizing orders for repayment of misused funds and provided only for adjustment or withholding of payments. However, as noted by the Third Circuit in *Atlantic County, supra*, in administering these programs, the Secretary of Labor had "been auditing grantees, disallowing costs and recovering misspent funds over a considerable period of time." 715 F.2d at 836 (citing cases); *see also North Carolina Comm'n of Indian Affairs, supra*, 725 F.2d at 242 ("Although the earlier laws provided no express right of recoupment, the Secretary of Labor routinely audited grantees, disallowed costs and recovered misspent funds"). The provisions of the 1973 CETA on which the Secretary bases his authority to order repayment were lifted directly from these earlier statutes. *See, e.g.*, Economic Opportunity Act of 1964, § 602(n), 78 Stat. 530 (allowing administrator to make "necessary adjustments on account of overpayments or

---

[Footnote continued from previous page]

well aware of the opinion she had authored in *Bell* a scant nine months earlier, particularly since the companion case, *Bennett* v. *New Jersey*, 53 U.S.L.W. 4337 (U.S. March 19, 1985), which she also authored, was the same case as *Bell* following the decision of the Third Circuit on remand. We therefore have little difficulty in reading *Bennett*'s silence as approval, if, indeed, anything more was required after *Bell*.

underpayments"); Emergency Employment Act of 1971, § 12(e), 85 Stat. 154 (identical to 1973 CETA § 602(b)). It is well established that "where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." *Lorillard* v. *Pons*, 434 U.S. 575, 581 (1978); *see also* 2A Singer, Sutherland's Statutory Construction § 49.09 (Sands 4th ed. 1984).

Moreover, there is nothing to suggest, as the Tribe argues, that the few remedies expressly provided in the 1973 Act were intended to be the sole and exclusive remedies available to the Secretary to secure compliance with the requirements of CETA. These remedies, which are contained in provisions describing the Secretary's powers in approving plans and disbursing funds, are limited to withholding or adjusting future payments, §§ 108(b)(2), 602(b), 87 Stat. 847, 878, and terminating the prime sponsor's plan, *id.* § 108(d), 87 Stat. 847-48. That Congress was concerned that the Secretary should insure that prime sponsors comply with the conditions under which they obtain CETA grants is evidenced by § 105(b), 87 Stat. 844, which requires prime sponsors to certify that their plans meet the Act's requirements, and by § 613, 87 Stat. 882, which authorizes the Secretary to audit sponsors "[i]n order to assure that funds provided under this Act are used in accordance with its provisions . . . ." It is unlikely that Congress would have limited available sanctions to offset or withholding of future payments on the one hand, and complete revocation of the program on the other. It is still more unlikely that Congress would have left no remedy at all for cases in which, although substantial sums of money have been

misspent, there are no further funds to be withheld because of program termination. A more reasonable conclusion is that Congress left it to the Secretary to establish additional remedial procedures, consistent with the purposes of the legislation, to insure compliance by prime sponsors. The House Report summarized the supervisory role envisioned for the Federal Government by stating:

> In short, the Secretary is expected to adopt administrative procedures for looking behind the certification of compliance of prime sponsors required by section [105(b)] that their plans meet the requirements of the section and that they will comply with all of the provisions of the Act, in order to assure that the requirements are being met. . . . Section [108(b)(2)] spells out the action to be taken by the Secretary upon receipt of a formal allegation from an affected unit of general local government that a prime sponsor is not complying with section [105], among other sections of the Act. However, the Committee does not intend that such formal allegation shall be the only means by which the Secretary assures himself of compliance with the Act, or is the only allegation of noncompliance which he would use as the basis for appropriate action to assure compliance. . . . It is the intent of the Committee that the Secretary has ultimate responsibility for assuring that manpower programs and policies are carried out in accordance with the purposes and provisions of the Act.

H.R. Rep. No. 659, 93d Cong., 1st Sess. 9 (1973), *reprinted in* 1973 U.S. Code Cong. & Ad. News 2935, 2942. Similarly, Representative Perkins, a sponsor of the bill and member of the House subcommittee that studied it, explained:

> This bill is a compromise between those who favor the so-called revenue-sharing approach and those who believe in a strong Federal role and responsibility. The compromise was to decentralize the planning and administration of manpower programs to State and local governments, but to require a careful Federal review and approval of the local plans and to place squarely with the Secretary of Labor the responsibility for seeing that the conditions and special requirements of the law, as well as its general purposes, are in fact being carried out. The ultimate responsibility for success or failure rests with the Secretary and we will hold him strictly accountable.

119 Cong. Rec. 42,877. *See also id.* at 25,709 (statement of Sen. Javits).

Finally, the Secretary consistently interpreted the 1973 Act as authorizing him to order repayment of misspent funds. *See, e.g., In re Vermont Offices of Manpower Services*, 76-CETA-103 (ALJ Feb. 25, 1976; Secretary Nov. 23, 1976); *In re Town of Burrillville*, 76-CETA-109, -110 (ALJ Nov. 10, 1976; Secretary May 2, 1978); *In re Bd. of County Comm'rs, Allen County*, 77-CETA-103 (ALJ Sept. 16, 1977); *In re Florida Farmworkers Council, Inc.*, 77-CETA-105 (ALJ Jan. 26, 1978); *In re Associated City-Council Economic Development Corp.*, 78-CETA-114 (ALJ Sept. 15, 1978). It scarcely needs repeating that "the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong . . .," *E.I. du Pont de Nemours & Co.* v. *Collins*, 432 U.S. 46, 54-55 (1977) (quoting *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969)), and that "[p]articularly is this respect due when the administrative practice at

stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.'" *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965) (quoting *Power Reactor Development Co.* v. *International Union of Electrical, Radio and Machine Workers*, 367 U.S. 396, 408 (1961)).

The Tribe argues that "if authority to require repayment existed in the 1973 Act, then the 1978 provision would be redundant." The 1978 Act entailed more than the insertion of some new language; Congress substituted an entirely new bill, incorporating new provisions along with rewritten versions of provisions from the 1973 Act, in order to "expand[ ] and clarif[y] existing law," S. Rep. No. 891, *supra*, at 16, 1978 U.S. Code Cong. & Ad. News at 4495. There is little doubt that Congress was aware of the Secretary's use of repayment orders under the 1973 Act. Ernest Green, Assistant Secretary of Labor, and Lawrence Rogers, Director of the Department's Office of Field Operations, testified at length about the Department's practice of ordering direct repayment in certain instances. *See* House Hearings, *supra*, at 772-78. Examples of past efforts by the Secretary to collect misspent CETA funds by ordering repayment also were frequently mentioned on the floor of the Congress; the consensus being that these efforts were inadequate. *See*, *e.g.*, 124 Cong. Rec. 25,168 (statement of Rep. Hawkins), 25,221 (statement of Rep. Cornell), 31,021 (statement of Rep. McGuire), 31,026 (statement of Rep. Collins). As noted above, strengthening the Secretary's enforcement powers was an important consideration in the new act. It is thus not surprising that in drafting the much more extensive and detailed provisions setting out the

Secretary's authority, Congress chose to make the Secretary's power to order repayment express.[17]

The Tribe argues finally that any authority to seek repayment "was lost when CETA was repealed in 1982 by the Job Training Partnership Act of 1982 [(JTPA), Pub. L. No. 97-300, § 184, 96 Stat. 1322, 1357-58]." However, the JTPA contains a savings clause that specifically preserves the Secretary's authority under CETA in certain cases. JTPA § 181, 96 Stat. 1354-57. Subsection (d) of § 181 preserves "[a]ll . . . determinations . . . which have been issued under the Comprehensive Employment and Training Act . . . on or before September 30, 1983" and provides that these "shall continue in effect until modified or revoked by the Secretary, by a court of competent jurisdiction, or by operation of law other than [the JTPA]." The Grant Officer's final determination was issued on September 28, 1981, well before the cutoff date of September 30, 1983. Alternatively, subsection (e) states that "[t]he provisions of [the JTPA] shall not affect administrative or judicial proceedings pending on October 13, 1982, or begun between October 13, 1982, and September 30, 1984, under the

---

[17] The Tribe points to an exchange between Senators Schweiker and Javits as evidence that the 95th Congress thought that the provisions authorizing repayment were new. Senator Schweiker proposed an amendment, which became § 106(d)(2), to limit the broad discretion to order repayment provided in subparagraph (d)(1) by *requiring* a repayment order for certain enumerated violations of CETA unless "special circumstances" exist. In response to a question from Senator Javits, Senator Schweiker replied that the amendment was not intended to be retroactive because "enforcement standards and policy should be clear in advance." 124 Cong. Rec. 27,803-04. However, Senator Schweiker was referring to limiting the Secretary's discretion *not* to order repayment in certain instances, which was new in 1978, and not to providing the Secretary with authority to order repayment, which was not.

Comprehensive Employment and Training Act." Administrative proceedings in this case were initiated on October 13, 1981, when the Tribe requested a hearing before an ALJ to challenge the Secretary's final determination; the hearing was held on December 17, 1982. The administrative proceedings were thus "pending on October 13, 1982, or begun between October 13, 1982 and September 30, 1984," and hence were not affected by passage of the JTPA.

The petition to review is denied.

U.S. Department of Labor

Office of Administrative
Law Judges
1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of
ST. REGIS MOHAWK TRIBE, NEW YORK — Case No. 82-CTA-35

Jeanne S. Whiting
Deputy Director
Native American Rights Funds
Boulder, CO
for the St. Regis Mohawk Tribe

Jonathan Kay
Office of the Regional Solicitor
U.S. Department of Labor
New York, NY
for the Grant Officer

DECISION AND ORDER

This is a proceeding brought under the Comprehensive Employment and Training Act of 1973, as amended (29 USC 801 *et seq.*, hereinafter referred to as the "Act"), and the regulations issued by the United States Department of Labor (hereinafter referred to as the "Department") as the result of the final determination of the Department's grant officer disallowing expenditures of $68,334 made by the St. Regis Mohawk Tribe of New York (hereinafter referred to as the "Tribe") from CETA grant funds.

A hearing was held in New York, NY, in December 1982 at which the parties adduced testimonial and documentary evidence. After the hearing the parties submitted additional documentary evidence and in June 1983 filed post-hearing briefs and reply briefs.

FINDINGS OF FACT

1. *The Grants*

a. *Grant No. 99-6-522-30-127*

On 16 September 1975 the Head Chief of the Tribe and on 22 December 1975 a "contracting" officer of the Department executed Grant No. 99-6-522-30-127 (AF Tab C.7, p. 1). The grant was awarded under the Indian program aspect of Title III of the Act in the amount of $129,209 and ran for 6½ months from 15 September 1975 to 30 June 1976.

The grant program narrative (AF Tab C. 7, pp. 5 *et seq.)* explained that the Tribe wished to continue a construction training program, then being conducted by it as subgrantee under a prime sponsor being terminated, through the end of the fiscal year, 30 June 1976. Training was to involve classroom and work experience sessions for ten (10) individuals. Some of the continuing participants were to be persons presently unemployed or in need of further instruction. Members of the Tribe with extensive experience in construction and particular teaching skills were to act as instructors. Classes between December and March were to be followed by work experience sessions between April and June.

In addition *(id.*, p. 6) six public service employment (PSE) jobs were to be created to assist in the conduct of various activities, from historical research to a food program for retired persons.

The contractual updating of the construction training program was followed by a description of the tribal organization and the proposed administration of the CETA

program. A section on Eligibility *(id.*, p. 11) described low income and un- or underemployment as the eligibility criteria "most acceptable to the community because of the large percentage of persons in these categories." Educational factors were also to be considered. These criteria were deemed "to serve justly an equitable portion of the community population" and to have "in the past proved to be adequate guidelines" *(ibid.)*.

On the whole, the Tribe was instituting a program in which

> "Indian people *will use* programs of training that are administered by Indian people themselves." (AF Tab C-7, p. 13)

A statistical appendix *(id.*, p. 14) described the tribal labor force as 1,030 men and women with a medium income of just under $6,000 for men and $1,900 for women. In terms of income levels 90% were described as being at the poverty level, 7% below and 3% above that level. Households averaged 5 persons and 25 families received public assistance.

The grant contained the standard assurances and certifications by grantees (AF Tab C. 7, pp. 18 *et seq.)* which include the grantee's agreement to abide by the Act and present and future regulations as well as OMB Circulars A-95 and FMC 74-4 as they relate to fund use, program operation and maintenance of records under the Act.

The grant was increased in March 1976 by Title II and VI base funds of $8,301 and $37,517 respectively (AF Tab C.10), in June 1976 by adding T.E.A. Title II base and discretionary funds of $22,205 and $5,549, respectively, and summer program funds under Title III of $36,345 *(id.*, Tab C.9).

In July 1976 the grant was extended to 31 January 1977 and funds increased by $32,302 under Title III (sec. 302) and $2,075 under Title II (AF Tab C.8). Altogether at its end grant No. -127 had grown from $129,209 to $273,503.[1]

b. *Grant No. 99-7-522-30-54*

This grant was executed by the Tribe's Head Chief and the Director of the Department's Division of Indian and Native American Programs (DINAP) in August and October 1976. It provided $129,833 in Indian program funds under Title III and $9,085 in Title II base funds under the Act (AF Tab D.11, p. 1). The grant was to run from 1 October 1976 to 30 September 1977.

The Title II funds are stated in the Tribe's program narrative to be intended for public services to the Indian community living in the service area (AF Tab D.11, pp. 8-9). Two persons would receive positions as librarian and porter *(id.,* pp. 3-5, 8-9).

Under Title III 13 persons would receive training to improve employment prospects *(id.,* pp. 6-7, 10 *et seq.).* Concern for eligibility and the tribal view of the applicable standard of eligibility were summarized as under Grant No. -127 (see AF Tab D.11, p. 12). The persons to be employed were to include six paraprofessional or clerical PSE position and 7 construction jobs (*id.,* p. 18).

The grant included an administration budget of $22,696, including $2,096 for administrative travel to con-

---

[1] The AF contains only the signature pages of the three modifications (AF Tab C.10, C.9, C.8). If there were other substantive program changes and new programs they are not otherwise disclosed.

ferences and to Washington, DC *(id.,* p. 23). It also included the same Assurances and Certifications as the prior grant *(id.,* pp. 26 *et seq.).*

Seven modifications raised the grant funds from $138,918 to $1,012,830 (AF Tabs D.18 to D.12), increasing funds under Titles II and III, originally provided, and added youth programs funds (Title III, SPEDY, YCCIP and YETP) of about $90,000 and Title VI base funds in excess of $500,000 *(ibid.).* Modifications Nos. 3 (AF Tab D.16) and 12 *(id.* D.12) extended the grant first to 30 September, then to 31 December 1978. Again only the signature pages of the grant modifications have been placed in the record.

2. *Grant Performance, Audit and Final Determination*

Upon award of the grants the Tribe in each case set out to continue or institute the programs or projects for which the grant provided funds. The Tribe, however, now complains (see T152) that the Department failed to furnish during the grant period such technical assistance as would have prevented the actions on which the disallowances are based and that on the occasion of the visits of the federal representatives during the period of grant performance the latter never brought to the Tribe's attention any of the specific acts which brought about the disallowances. Counsel for the Tribe conceded at the hearing (T153) that the Department did not violate any regulatory obligation regarding its conduct toward the Tribe. Little evidence has been adduced to establish tribal demands for technical assistance and none of a refusal to give such help. On the contrary, it appears that assistance

was provided over the telephone, whenever requested (see Tr. Ex. 10). But the Tribe has not provided any detailed proof of the assertion that adequate assistance was not given.

Moreover, the Tribe has not provided any information as to what technical assistance it sought. The problems in this proceeding, except perhaps as to Finding No. 13 in the final determination, does not involve unusual aspects of grant administration. Most of the disallowances and disallowed funds flow from the Tribe's failure to preserve records of applications by participants and to watch with sufficient care over those which it prepared as a regular part of the application and intake process: signing, dating, filling in each item, spotting conflicting answers and correcting them. The record shows that the Tribe knew how to accomplish these tasks and it is difficult to see what technical assistance could have overcome the lack of care which at times prevailed in the Tribe's grant administration.

In early 1978 an Atlanta, GA, firm of certified public accountants under contract with the Department performed an audit of Grants Nos. -127 and -54. The former grant had reached its terminal point about 12 months before; the latter still had, as it turned out, about 10 to 12 months to run. An exit conference upon completion of the audit was held on 5 May 1978. The completed audit report was sent to the then Director of the Office of Audit Operations in the Department's Directorate of Audit and Investigations in Washington, DC, but the date of this letter-report does not appear in the xeroxed copy in the administrative file (AF Tab B). Nor does it appear what

action the Director of the Office of Audit Regulations took on the report and when and where he sent it.

It was not until two and one-half years later that the Director of the Grant and Audit Closeout Task Force in the Employment and Training Administration, issued the initial determination. Dated 18 November 19380 (AF Tab A5b), it disallowed costs only under Grant No. -127, which had expired and was totally silent as to the later Grant No. 54 although both grants had been audited together and had been the subject of the same audit report (AF Tab B).

In response to this initial decision the Tribe in January and June 1981 submitted additional information to the Contract Closeout Task Force (see Memo, dated 7 Dec., 1981, AF Tab A.3; for the 5 June 1981 submission see (AF Tab A.4). In response to these submissions the grant officer (Director, Grant and Audit Closeout Task Force) issued a revised initial determination on 15 July 1981 (AF Tab A.5a and A.5b), covering both grants, and on 28 September 1981 the final determination (AF Tab A.2a and A,2b) in which he disallowed out of $150,666 in questioned costs the amount of $68,334 in issue here.

The disallowances under Grant No. -54 cover the entire period of that grant to its termination date of 31 December 1978. The period between the end of the audit (30 September 1977) and the end of the grants was fiscally reviewed in the grant closeout and costs were questioned in the closeout exceptions (AF Tab 2a, p. 1). On these facts it is unavoidable to find that the grant officer had received the complaint, *i.e.* the report of the audit of, and the closeout exceptions related to, Grant No. -127 at

least shortly before 18 November 1980 (AF Tab A.4, p. 1) and the audit report regarding Grant No. -54, showing questioned costs of $36,881 (AF Tab B, Aud. Ex. I), at the same time. But there is no showing when the grant officer received the closeout exceptions under Grant No. -54 which added the costs questioned under that grant $82,189 and raised the total to $129.060.

Those "complaints", *i.e.* audit reports or closeout exceptions received before 18 November 1980, were received more than 120 days before the final decision. As to the Grant No. -54 closeout exceptions no date of reecipt by the grant officer is shown and it may have been on or after 1 June 1981. In such event the final determination of 28 September 1981 may just have been issued within the 120-day period prescribed and defined in 20 CFR 676.86(a)(1).

The grant officer issued his final determination on 28 September 1981 (AF Tab A.2a and A.2b). He divided the questioned costs into sixteen (16) Findings of which the first eight deal with Grant No. -127 and the last eight with Grant No. -54. A hearing on all disallowances was timely requested and they must herein be considered factually on the evidence, subject to such general or specific legal arguments as the Tribe has presented and which are taken up hereafter in the Conclusions of Law.

3. *The Disallowances*

a. *Grant No. -127*

All disallowed costs under this grant were, as already stated, incurred 1 July 1976 and 31 January 1977.

(1) *Findings Nos. 2 and 3 (Audit Ex. I-B and -C)*

Under these findings the grant officer disallowed wages and fringe benefits paid to three Title III (SPEDY) participants because family income exceeded the level set by the poverty guidelines (see 29 SFR 97.14(a)). The names of the participants are identified in the final determination.

At the hearing no further evidence was adduced by the Tribe and the validity of the disallowance in effect conceded (T60). Accordingly, the record is devoid of facts which would justify a total or partial reversal of the disallowance, amounting to $2,007 in wages and $228 in fringe benefits for a total of $2,235.

(2) *Findings Nos. 6 and 8 (Aud. Ex. II-C and II-D)*

In these findings the grant officer disallowed wages and fringe benefits paid to seven Title III (SPEDY) participants for lack of documentation of family income.

At the hearing payments made to E.T. and T.Sq. were conceded to be allowable (T61-2, 76) and those to B.B. and G.T. were conceded to be subject to disallowance (T68. 70).

Of the remaining three participants information furnished on H.H. shows him to have been at most underemployed, working occasionally on the St. Lawrence river dock at Cornwall (T69) and on R.R. to have never worked before the SPEDY participant job (T71). His mother had left the home and his father was on disability *(ibid.)*. This information shows them to have been qualified participants. No information other than that she was not living at home was furnished on the third participant J.W. and her eligibility has not been established.

Based on the wages reported in the audit (AF Tab B, pp. 106-107) with added fringe benefit costs at 11.38% the grant officer's disallowance is upheld in the amount of $2,128.00.

(c) *Findings Nos. 7 and 8 (Aud. Ex. II-C and II-D)*

The grant officer disallowed $978 in wages and fringe benefits paid to Title III (SPEDY) participant H.H. because neither his family income nor work history were documented. The testimony on his sporadic employment at the Cornwall dock (T69) indicates both low income and at most underemployment. An affidavit executed by him in July 1982 states that he was employed in a CETA program during 1976 and 1977 and had been unemployed before then for 6 months (Tr. Ex. 1).

The evidence may not be absolutely compelling but it certainly goes far to support the contention that H.H. both because of lack of employment and low family income was an eligible CETA summer youth program participant, especially in the light of the Tribe's economic situation, as described in the grant narratives (AF Tabs C, D) and set forth hereinabove.

Hence, the amount disallowed in Findings Nos. 7 and 8 can now on the additional evidence be allowed.

(2) *Grant No. -54*

Disallowances under this grant relate to expenditures incurred between 1 October 1976 and 30 September 1977 (AF Tab B). This period overlaps in part to period for which Grant No. -127 was audited.

(a) *Finding No. 10 (Aud. Ex. I-A)*

The grant officer disallowed $1,465 of the travel expenses by tribal personnel in 1977 because approval of travel outside the State of New York had not been documented as required by the regulations, to wit: in writing.

At the hearing one item of travel expense of $202.50 was conceded to be allowable (T48,59). As to travel to Atlanta, GA, in May and Pittsburgh, PA, in August, 1977, on which $1,122.50 was spent (AF Tab B, pp. 74 *et seq.*), the current Tribal Administrator, formerly a CETA manpower aide (T42-3), testified that the Atlanta trip involved a CETA prime sponsor training meeting and the Pittsbrugh trip a CETA staff meeting to straighten out the carry-over of funds at the end of Fiscal Year 1977. In both instances the Department's federal representatives for the tribal grant asked the latter's CETA administrators to send appropriate personnel. Two federal representatives in a later memorandum, dated 15 January 1983, confirmed such oral approval (Tr. Ex. 10). Neither they nor another federal representative, identified in the testimony (T48), were called to controvert the allegations of the Tribe's witnesses.

On these facts, departmental or grant officer approval for the Atlanta and Pittsburgh travel is clearly established and the travel was clearly connected with CETA grant business. Hence, these costs are allowable and on the factual record allowed.

This leaves one item of travel cost of $140 in July 1977. This trip was clearly not out-of-state travel although it is not entirely clear that the meeting which the Tribe's representative attended took place in Albany, NY. An invoice (Gt Off. Ex. 1) describes the expenses as "4

days per diem for Iroquois Conference". The character of the conference has been lost in the mist of time. The current Tribal Chief (T16-17) testified that the person involved in the disputed travel worker at the Tribe's tourist center and went to Albany to attend a workshop. He added that the meeting was not a tribal conference (T26-27).

However important the development of tourism may be to the upstate New York Indian groups it is difficult to see how the disputed trip advanced the specific purposes of the CETA Grant No. -54. Both the lack ot an obvious connection between the CETA grant and the CETA-paid travel and the uncertainty of the purpose thereof make it inappropriate to reverse the grant officer's disallowance of this part of the travel costs under Finding No. 7.

Accordingly, on the facts which the record establishes the disallowance of travel costs is upheld in the amount of $140.00.

(b) *Finding No. 11 (Aud. Ex. I-b and I-c)*

The auditors questioned compensation paid to participants in the total amount of $24,970 as follows (AF Tab B, pp. 78-80, 85):

	Wages	Fringe Benefits
Title VI	$18,405	$1,780
Title III (sec. 302)	1,800	230
Title III (SPEDY)	1,281	147
Title III (sec. 302)		1,267
	21,546	3,424

The last fringe benefit item represents the cost of fringe benefits in respect of wages in issue in Finding No.

13 and will be dealt with there. Of the thus reduced total of $21,546 in wages and $2,157 in fringe benefits costs the grant officer allowed $6,404 and $629 respectively, disallowing a total of $17,937.

The disallowance under Title VI was thus reduced for wages to $12,705.50 and for fringe benefit costs to $556.00. For SPEDY expenses disallowed wages were reduced to $637.50 and fringe benefit costs to $74.00.

At the hearing the Tribe conceded that the following amounts paid as wages were properly disallowed:

AS	$ 880.00 (T93)
WP	4,699.59 (T92)
DT	1,350.00 (T105)
MC	637.50 (T105)
	$7,367.09

The Tribe further contended that L.Gr., L.G., Sh.L, D.C., J.C. and S.B. performed CETA staff functions (T94, 104; Tr. Ex. 2, 3, 4) and were not participants. Hence, the eligibility requirements under the Act and regulations for their employment were not applicable to them and failure to show compliance therewith immaterial as to these individuals. This contention runs on its face afoul of the fact, demonstrated by the audit report (AF Tab B, pp -79 *et seq.*), which shows that these individuals were paid as participants out of fund allocated under the grant for their compensation and support.

Apart from this obstacle the grant officer has shown —and his showing has not been countered, by evidence on behalf of the Tribe—that no funds were left in the participant training and administration budgets to transfer the cost of these wages and frjnge benefits thereto (Gt. Off. Ex. 8, 9, 10, 11, 13, 14).

To the extent that the six participants could be treated as staff rather than participants, it may be possible to amend the grant *ex post facto* by reducing budgeted participant and increasing administrative or training expense, as the case may be. See Final Determination, p. 7 (instructor's salary) where a budgetary realignment was made at a later date.

But this is a reqeust which should have been presented to the grant officer or the Department and may hereafter be presented to them if and when the latter become engaged in collecting any funds due hereunder to the Government.

As to the three remaining participants the mother of A.G. was on public assistance and the participant was unemployed (T87-8) and M.Ch. was living with his mother who at least in 1980 was on social security. However, M.Ch. was not unemployed 15 weeks out of the last 20 weeks (see 29 CFR 99.42(a)(1)(iii)) but showed only 12 weeks of unemployment and hence was not eligible (T90). The third participant (A.W.) stated that she was working, when filling out her CETA application. The explanation that she so answered because of her expected CETA employment is in my view too great a distortion of the situation to be credible (T93).

Hence, the disallowance under Finding No. 11 of $17,937 is reduced by the $1,267 reserved for Finding No. 13 (*infra.* (d) and the amount paid to A.G. or $880 plus $100.14 for fringe benefits to $15,689.86 and to that extent is supported factually by the record.

(c) *Finding No. 12 (Aud. Ex. I-A)*

Under this Finding the grant officer disallowed tuition and related travel to two persons who were not CETA

participants, amounting to $528.00. Only one person, however, a tribal member WV, was sent to a course to be trained in counselling alcoholics. She completed her course and thereafter engaged in counselling tribal members with alcoholic problems (T118-119). The Tribe's CETA Director, who testified on the matter, conceded that VW was neither a CETA staff member nor a participant (T12). However laudable the Tribe's action and however necessary or desirable counselling of alcoholics, grant funds could not be spent on any person who was not a CETA staff member or participant. Hence, on the testimony given by the Tribe's witness the expenditure was properly disallowed.

(d) *Finding No. 13 (Aud. Ex. I-E)*

Wages of $9,918 and fringe benefit costs of $1,267 (see F.D., p. 4) were disallowed under Finding No. 13. They were paid to H.C. who in 1977 was a manpower aide to the Tribe's CETA director and who worked as such until 30 September 1977. His status as such is somewhat in dispute because after sometime between February and July 1977 H.C. ceased to interview applicants and sign intake records as the interviewer (T139). He continued nevertheless to work on CETA reports which the Tribe was required to file and to work as an aide to the director (T193).

In or about February 1977 H.C. became involved in a plan for the Tribe to purchase a printing press. The owner of the press operated a printing business on the reservation (T190) and was willing to sell it to the Tribe. H.C. and others who favored the purchase saw in it an opportunity for the Tribe to conduct a profitable business and

to expand the technical skills of its members (T128, 131). Since, however, no tribal members were familiar with the operation of the press, H.C. spent about one-half of his working time between February and September 1977 at the printing plant to learn its operation (T128, 130). In this situation he was not an employee of the printing press owner and did not work for him, except incidentally on occasion to learn some operation (T129, 134, 191). While at the plant, H.C. continued to be paid by CETA (T191).

Ultimately the project failed. The then CETA director opposed it (see T192) and the tribal funds available for the purpose had to be used to pay the tribal police force after a LEAA grant to the Tribe ran out and was not continued (T25).

On the facts thus disclosed it is clear that the printing press purchase was a tribal as distinct from a CETA project or activity. It is further established that H.C. was not at any time an employee of the printing press owner or that the payment of H.C.'s compensation was a subsidy to the printing enterprise. To the extent that H.C. performed his duties as a CETA staff employee he was properly paid by CETA. To the extent that he devoted regular working time to the Tribe's project of acquiring the printing press he can obviously not be paid by CETA for non-CETA work. According to his testimony H.C. spent one-half of the working time of the last six to nine months of the 1977 fiscal year at the printing plant (T130) and did not sign intake applications after February 1977 (T139). He would thus have spent something like 8 months (less in January and February 1977, more thereafter) half-time at the printing plant.

His total compensation was 11,1750.00 and one half of two-thirds thereof (or one-third) is on the facts shown subject to disallowance. This amounts to $3,728.33 as to which the Finding No. 13 disallowance is upheld.

(e) *Finding No. 15 (Aud. Ex. II-C and II-D)*

The grant officer disallowed $29,718 in wages and fringe benefit costs paid to 32 participants under Title VI (13), Title II (1), Title III (sec. 302) (1) and Title III (SPEDY) (17) because of inadequate personnel record information.

Subsequent to the final determination and in the course of this proceeding the Tribe introduced in evidence affidavits intended to provide family income and unemployment data to show that the participants executing them were eligible.

The disallowed costs include wages paid to 13 Title VI participants. Affidavits showing eligibility were furnished for eight and an affidavit showing excessive family income was furnished for one (Tr. Ex. 11). No countering evidence has been furnished by the grant officer beyond the audit report (AF Tab B, pp. 104-105). On balance, it seems fair to accept these affidavits and allow wages paid to those who executed them except in the one instance where ineligibility appears on the face of the affidavit.

The disallowances must be upheld as to those participants as to whom no evidence of eligibility is furnished:

J.B.	$ 880.00
R.R.	880.00
R.J.	880.00
E.J.	770.00
	$3,410.00

As to the 17 SPEDY participants the Tribe furnished affidavits showing eligibility for 6 participants (Tr. Ex. 11), executed either by the youthful participant or a parent or guardian. It furnished 5 other affidavits (Tr. Ex. 8). Of these however, only one is accepted (Aff. for L.T.). Of the other affidavits one is neither signed nor notarized and three are executed by persons other than the stated affiant. The acceptance of the affidavits as to which no cross-examination or investigation on behalf of the grant officer is possible goes far to assist the grantee Tribe in the interests of justice. The minimum which can be demanded is that such evidence is faultlessly prepared.

Hence, the disallowances are proper based on the lack of any record of eligibility as to the following SPEDY participants and amounts paid to them (AF Tab pp. 105-106):

B.T.	$ 643.50
D.G.	767.00
G.T.	643.50
S.R.	643.50
S.S.	696.00
P.B.	44.00
K.B.	643.50
C.B.T.	667.00
D.C.	702.50
	$5,450.50[2]

Two participants under Titles II and III received wages of $2,940. As to one no information was given, as

---

[2] Subsequent to the hearing the Tribe's counsel submitted eleven (11) application or intake forms for participants (Tr. Ex. 13). A majority of these forms gave no answer or conflicting or inadequate answers on the question of unemployment or on family income. Several related to participants whose pay was not disallowed under Finding No. 15.

to the other the information given was inadequate (see Tr. Ex. 13).

The amounts as to which the evidence adduced by the Tribe does not overcome the grant officer's disallowance total $11,800. At the previously applied rate of 11.38% fringe benefit costs to be disallowed in respect of the wage disallowance would amount to $1,342.84. The refund of New York State Taxes, improperly paid out by the Tribe in connection with fringe benefits is a matter to be pursued by it as a taxpayer. The loss of a right to refund cannot redound to the detriment of the Department. The total disallowance under Finding No. 15 would, therefore, be proper, if so held hereafter, in the amount of $13,142.84.

(f) *Finding No. 16 (Aud. Ex. II-E)*

Finding No. 16 involves the disallowance of four payments made by the Tribe between 18 February and 7 October 1977. The largest payment involved a payment to the Mohawk Tribal Equipment Co. The record contains no explanation as to this company or what it did. It should have been possible to document the payment and failure to do so as well as to document a payment to a company in Massena, NY, leads to the conclusion that the grant officer's action was proper.

There is no explanation of a $20.25 payment to H.J., nor any indication that it constituted a salary payment to him as instructor (see F.D., p. 8; Gt Off. Ex. 12). Accordingly, the disallowance of this payment was also appropriate.

The last payment was made subsequent to the audit period and its inclusion in the disallowance is unexplained. This matter does not appear to belong into this audit and must be taken up elsewhere.

Accordingly, on the record as constituted the disallowance under Finding No. 16 was proper in the amount of $1,453.00.

CONCLUSIONS OF LAW

The Tribe's brief opens with arguments on certain general propositions of law none of which, however, establish a bar against the grant officer's disallowances or the Department's right of recoupment of their amount.

I

Counsel for the Tribe argues first that the 1973 Act does not authorize recoupment. Whatever arguments may once have supported this point of view, it is no longer arguable. *Bell v. New Jersey and Pennsylvania*, 103 S.Ct. 2187 (1983). The principle laid down in *Bell*, *supra*, has been applied to recoupment claims under the 1973 Act and the right of the grant officer and of the Department to recoup misspent grant funds is beyond challenge. It suffices to refer to *Atlantic County, NJ v. U.S. Department of Labor*, 715 F2d 834 (3d Cir., 1983).

Bell v. New Jersey and Pennsylvania, supra, was decided before counsel for the Tribe filed her reply brief. Her attacks on *Bell*, set forth therein are not well taken. *Bell* makes it plain that the right to recoup misspent grant funds is an inherent right of the Government and is not dependent on a statutory provision. Hence, its absence in the 1973 Act is irrelevant and its discussion of the common law right issue mistaken. *Bell* expressly recognizes the right of the Government to enforce its rights initially through administrative proceedings. *Bell* and its CETA

progeny[3] implicitly recognize the grantee-debtor's duty to make repayment from its own funds. It would be no recoupment at all and, indeed, absurd if the grantee-debtor could repay his indebtedness to the grantor by using the latter's money advanced to the grantee-debtor under another grant.

II

The Tribe next argues that the grant officer has the burden to prove the negative that funds have been misspent. The regulations (20 CFR 676.90(b)) to the contrary place the burden of proof of the propriety of its expenditures on the grantee who spent the money. Provided that the grant officer establishes *prima facie* what the improper expenditures are through his decisions and the audit report—as has been done here—the regulatory scheme is valid. *Office of Maine CETA v. U.S. Department of Labor*, 669 F2d 827 (1st Cir., 1982); *Quechan Indian Tribe v. same* (9th Cir., 1984).

III

The Tribe next claims that the Federal Government's well-known trust obligations toward the Indian Tribes preclude the Department from collecting an indebtedness owed it under a CETA grant. But nothing in the cases cited by the Tribe's counsel deals with the relationship between the Government as grantor and the Indian Tribe as grantee of a monetary grant, the Tribe's obligation to abide by its terms and the Tribe's obligation to repay

---

[3] In addition to *Atlantic County, supra, North Carolina Commission of Indian Affairs v. U.S. Department of Labor*, 725 F2d 238 (4th Cir., 1984); *California Tribal Chairmen's Association v. same*, 730 F2d 1289 (1984).

misspent funds. See *Quechan Indian Tribe, supra,* upholding the recoupment right or repayment obligation in part.

The Bartlett Act case cited by counsel *(Eric v. Secretary of HUD,* 464 F.Supp. 44 (D.AS, 1978)) involves the enforcement of fiduciary obligations which the State of Alaska had to Indian and other native inhabitants, represented by the Federal Government in a trust capacity. The law applicable in these circumstances has no bearing on the instant case. For what is before me here is the Tribe's trust obligation to its grantor, the Department, and not the latter's obligation to the Tribe.

Nor does it help the Tribe to invoke the Department's inchoate duty to provide technical assistance to the Tribe in the administration of the grant. In the first place the record, including the affidavit of the former tribal CETA director (Tr. Ex. 9), shows beyond doubt that the Department gave assistance, whenever asked. It further shows that the Tribe and its CETA director made no systematic or broad requests for any assistance. Finally, no such broad overall duty exists under the Act and the regulations. Whatever specific duty existed the grant officer and his collaborators fulfilled.

Hence, the Tribe's "trust" argument does not relieve it of its obligation to refund misspent grant funds.

IV

The Tribe also advances the argument that the grant officer's decision was invalid because not issued within the time limits set by 20 CFR 676.86 and 676.88. The Department for reasons explained in numerous decisions of

the administrative law judges of the Department have held that the aforesaid limitations, based on section 106(b) of the Act (29 USC 816(b)), are not construed as limitations the violation of which outlaws the claim. See *Mobile CETA Consortium*, 82-CTA-209(1084) and the cases there cited, where this matter is fully discussed. The cited limitation are capable of being inforced by various means, administrative as well as procedural, but their violation does not create a bar to the Department's recoupment claim.

The Tribe's counsel cites a departmental field memorandum which notes that the 120-day period is not flexible. But such a memorandum or statement, addressed internally to departmental personnel, is a far cry from adopting a rule that exceeding the 120-day period releases the CETA grant from any obligation to repay misspent funds. Whatever weight is to be given to such an internal, document it cannot, in any event, carry the day for the Tribe.

V

Ultimately, as in most, if not all, audit disputes the propriety of the disallowances or the grantee's expenditures must be determined. If the expenditures are found to have been proper contrary to the audit report's recommendations or questioning, the cost will be allowed. If the funds are shown to have been misspent, as made under Findings Nos. 10, 12 and 13 in whole or in part for impermissible purposes, or as made under Findings Nos. 11 and 15 because the eligibility of the recipients of grant funds cannot be established, the disallowances must stand.

Part 3 of the Findings of Fact sets forth the determinations based on the record as a whole which in substantial part concur with the views presented by the Tribe. In particular, weight has been given, to the extent of credibility, to the Tribe's affidavit evidence, documents and testimony. For a like procedure see *Crow Creek Sioux Tribe*, 81-CTA-298, -308; 82-CTA-59 (1984).

No legal obstacles are found in the regulations cited by the parties to the adoption of these determinations as a matter of law and they are so adopted.

VI

Accordingly, the grant officer's disallowances in the Final Determination of 28 September 1982 are upheld as follows:

Findings Nos. 2, 3	$ 2,235.00
Findings Nos. 6,8	2,128.00
Finding No. 10	140.00
Finding No. 11	15,689.86
Finding No. 12	528.00
Finding No. 13	3,728.33
Finding No. 15	13,142.84
Finding No. 16	1,453.00
	$39,045.03

Hence, the St. Regis Mohawk Tribe is ordered to repay to the United States Department of Labor out of non-CETA funds the sum of $39,045.03.

Whether the Tribe may repay this amount wholly or partly in kind, whether because of lack of funds the amount due may be treated as uncollectible or whether the debt may be forgiven on hardship grounds, as the Tribe's coun-

sel has argued, are matters which are not before me and can be urged by the Tribe when an attempt is made to collect the debt due the Government.

Dated: Washington, DC
4 January 1985

/s/ RUDOLF SOBERNHEIM
Administrative Law Judge

SERVICE SHEET

Jonathan Kay
Office of the Regional Solicitor
U.S. Department of Labor
1515 Broadway
New York, NY 10036

Jeanne S. Whiting
Native American Rights Funds
1506 Broadway
Boulder, CO 80302-6296

Associate Solicitor for
Employment and Training
Legal Services
U.S. Department of Labor
Room N-2101, 200 Constitution Ave NW
Washington, DC 20210

Seth D. Zinman
Associate Solicitor for
Legislation and Legal Counsel
U.S. Department of Labor
200 Constitution Ave NW
(R. N2428)
Washington, DC 20210

Supreme Court, U.S.
FILED
FEB 14 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-949

In the Supreme Court of the United States

OCTOBER TERM, 1985

ST. REGIS MOHAWK TRIBE, PETITIONER

v.

WILLIAM E. BROCK, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

GEORGE R. SALEM
Deputy Solicitor of Labor

ALLEN H. FELDMAN
Acting Associate Solicitor

MARY-HELEN MAUTNER
Counsel for Appellate Litigation

STEVEN J. MANDEL
Attorney
Department of Labor
Washington, D.C. 20210

QUESTIONS PRESENTED

1. Whether Section 106(b) of the Comprehensive Employment and Training Act of 1973, 29 U.S.C. (Supp. V 1981) 816(b), which stated that the Secretary of Labor "shall" issue a final determination within 120 days of the receipt of a complaint alleging the unlawful use of CETA funds by a grant recipient, barred the Secretary from recovering misused grant funds when he failed to issue a final determination within the 120-day period.

2. Whether the Secretary of Labor had authority under Section 602(b) of the Comprehensive Employment and Training Act of 1973, 29 U.S.C. (1976 ed.) 982(b), to require repayment of funds misspent by a grant recipient prior to 1978.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	8
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Atlantic County v. *United States Department of Labor*, 715 F.2d 834	5, 9
Bell v. *New Jersey*, 461 U.S. 773	5, 7, 9, 10, 11
Brock v. *Pierce County*, cert. granted, No. 85-385 (Nov. 4, 1985)	8
California Tribal Chairman's Ass'n v. *United States Department of Labor*, 730 F.2d 1289	9
Fort Worth National Corp. v. *FSLIC*, 469 F.2d 47	6
Mobile Consortium of CETA v. *United States Department of Labor*, 745 F.2d 1416	9
North Carolina Commission of Indian Affairs v. *United States Department of Labor*, 725 F.2d 238, cert. denied, No. 83-1981 (Oct. 1, 1984)	9
Texarkana Metropolitan Area Manpower Consortium v. *Donovan*, 721 F.2d 1162	9

Statutes and regulations:

Comprehensive Employment and Training Act, 29 U.S.C. (Supp. V 1981) 801 *et seq.*	2
29 U.S.C. (Supp. V 1981) 813(a)(21)	3
29 U.S.C. (Supp. V 1981) 816	4, 11
29 U.S.C. (Supp. V 1981) 816(b)	4
29 U.S.C. (Supp. V 1981) 816(d)	4, 10
29 U.S.C. (Supp. V 1981) 817	6
29 U.S.C. (Supp. V 1981) 817(a)	4

Statutes and regulations—Continued: Page

29 U.S.C. (Supp. V 1981) 823-827 2
29 U.S.C. (Supp. V 1981) 835(a) 3
Job Training Partnership Act, 29 U.S.C. 1501 *et seq.* 2
29 U.S.C. 1591(d) 8, 12
29 U.S.C. 1591(e) 2, 8, 12
Pub. L. No. 93-203, 87 Stat. 839 *et seq.* 2
§ 602(b), 87 Stat. 878, 29 U.S.C. (1976 ed.) 982(b) 3, 7, 8, 10
§ 613, 87 Stat. 882, 29 U.S.C. (1976 ed.) 992 3
Pub. L. No. 95-524, 92 Stat. 1909 *et seq.* 2
Pub. L. No. 97-300, § 184(a)(1), 96 Stat. 1357 2
Pub. L. No. 95-561, 92 Stat. 2143 *et seq.*:
92 Stat. 2190, 20 U.S.C. (Supp. V 1981) 2835 .. 11
92 Stat. 2191, 20 U.S.C. (Supp. V 1981) 2835 (b) 10, 11
92 Stat. 2342, 20 U.S.C. (Supp. V 1981) 1226a-1 11
20 C.F.R.:
Section 675.5 2
Section 676.21-676.30a 2
Section 676.51-676.76 2
Section 676.86(d) 4
Section 676.88 4
Section 676.91(f) 6
Section 676.88-676.92 4
29 C.F.R.:
Section 98.2 (1976) 3
Section 98.15 (1976) 3

Miscellaneous:

124 Cong. Rec. (1978):
p. 25168 10
p. 25221 10
p. 31021 10
p. 31026 10
H.R. Rep. 93-659, 93d Cong., 1st Sess. (1973) 2
S. Rep. 95-891, 95th Cong., 2d Sess. (1978) 2, 10

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-949

ST. REGIS MOHAWK TRIBE, PETITIONER

v.

WILLIAM E. BROCK, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-32) is reported at 769 F.2d 37. The opinion of the administrative law judge (Pet. App. 33-57) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 17, 1985. On September 23, 1985, Justice Marshall extended the time within which to file a petition for a writ of certiorari to and including

December 2, 1985, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Comprehensive Employment and Training Act of 1973 (CETA), 29 U.S.C. (Supp. V 1981) 801 *et seq.*, authorized the Secretary of Labor to grant federal funds to qualified entities, such as states, local government units, and Indian tribes, for programs "provid[ing] job training and employment opportunities for economically disadvantaged, unemployed, or underemployed persons." 29 U.S.C. (Supp. V 1981) 801; see also S. Rep. 95-891, 95th Cong., 2d Sess. 4, 42-43 (1978); H.R. Rep. 93-659, 93d Cong., 1st Sess. 1-3 (1973).[1] The statutory scheme was carefully constructed to ensure that programs financed with CETA funds would further the purposes of the Act. Thus, the statute prescribed detailed eligibility standards for participants in CETA programs and set forth the terms and conditions governing the employment of such program participants. See 29 U.S.C. (Supp. V 1981) 823-827; see also 20 C.F.R. 675.5, 676.21 to 676.30a, 676.51 to 676.76. Each grant recipient was required to submit assurances that its program would comply with all applicable statutory

---

[1] The statute originally was enacted in 1973 (Pub. L. No. 93-203, 87 Stat. 839 *et seq.*) and was amended substantially in 1978 (Pub. L. No. 95-524, 92 Stat. 1909 *et seq.*). The CETA was repealed effective October 13, 1982, and replaced by the Job Training Partnership Act, 29 U.S.C. 1501 *et seq.* (see Pub. L. No. 97-300, § 184(a)(1), 96 Stat. 1357). However, the CETA continues to govern administrative or judicial proceedings pending on October 13, 1982, or begun between October 13, 1982, and September 30, 1984 (29 U.S.C. 1591(e)).

and regulatory requirements (29 U.S.C. (Supp. V 1981) 813(a)(21)).

Under the 1973 Act, the Secretary had broad authority to audit grant recipients to assure that funds provided under the Act were used in accordance with the statutory requirements. Pub. L. No. 93-203, § 613, 87 Stat. 882, 29 U.S.C. (1976 ed.) 992. If the Secretary determined that funds had been misspent, he could make necessary adjustments in payments. The Secretary also was empowered, in specified circumstances, to withhold future funds in such cases. § 602(b), 87 Stat. 878, 29 U.S.C. (1976 ed.) 982(b).[2] In the event that the Secretary chose to withhold funds, however, the grantee was not permitted to reduce program operations. 29 C.F.R. 98.15 (1976).

The 1978 CETA amendments similarly stated that the Secretary of Labor could conduct audits of grant recipients "[i]n order to assure that funds provided under [the CETA] are used in accordance with its provisions" (29 U.S.C. (Supp. V 1981) 835(a)).[3]

---

[2] The Secretary was authorized to make CETA grant payments prior to the recipient's expenditure of the funds, as reimbursement for past expenditures, or otherwise, as the Secretary deemed necessary to carry out the Act's provisions. § 602(b), 87 Stat. 878, 29 U.S.C. (1976 ed.) 982(b). The Secretary by regulation chose to use an advance-funding method of distributing CETA funds because most recipients were unable to operate on a cost-reimbursement basis. 29 C.F.R. 98.2 (1976).

[3] Typically, an audit was performed or arranged by the Department of Labor's Office of Inspector General and the audit report was forwarded to the Department of Labor grant officer responsible for the particular grant. The grant officer provided the grant recipient with an opportunity to comment on the report, issued an initial determination, offered to at-

In addition, the statute permitted any interested person, such as a program participant, to file a complaint with the Secretary alleging that a grant recipient had failed to comply with CETA standards (29 U.S.C. (Supp. V 1981) 816).

Section 106(b) of the Act, 29 U.S.C. (Supp. V 1981) 816(b), which was added by the 1978 amendments, stated that if the Secretary obtained information—either as the result of an audit or through the receipt of a complaint—concerning a grant recipient's failure to adhere to the Act's requirements, the Secretary was required to investigate the matter. The same provision then stated that "not later than 120 days after receiving the complaint," the Secretary "shall" make a "final determination" regarding the allegation involved (*ibid.*). If after notice to the grant recipient and an opportunity for a hearing, the Secretary found that the grant recipient violated the CETA's requirements, the Secretary expressly was authorized to order the grant recipient to repay any misspent funds to the United States. 29 U.S.C. (Supp. V 1981) 816(b) and (d).

2. Petitioner, a New York Indian tribe, received CETA grants from the federal government in 1975 and 1976 (Pet. App. 2-3, 34-37). On May 5, 1978, a

---

tempt informally to resolve the dispute, and then issued a final determination. 20 C.F.R. 676.86(d), 676.88. The grant recipient was entitled to a hearing before an administrative law judge (ALJ) with respect to the grant officer's final determination. The ALJ then rendered a decision that, if not modified or vacated within 30 days, became the final decision of the Secretary. A decision adverse to the grant recipient or another interested person was subject to judicial review in a court of appeals. 29 U.S.C. (Supp. V 1981) 816(b), 817(a); 20 C.F.R. 676.88 to 676.92.

private accounting firm completed an audit of petitioner's grants and thereafter filed an audit report with the Labor Department grant officer who administered the grants (*id.* at 3, 38). The grant officer issued a final determination on September 28, 1981, over three years after completion of the audit. He disallowed $68,334 in costs claimed by petitioner, principally on the ground that petitioner had hired ineligible CETA participants. *Id.* at 4, 41-52.

Petitioner sought review of the grant officer's determination before an administrative law judge (ALJ). The ALJ found that petitioner had incurred $39,045.03 in costs in violation of CETA regulations and ordered the repayment of these funds to the United States (Pet. App. 4, 40-52, 56). Petitioner argued that the 1973 CETA did not authorize recoupment by the Secretary of misspent grant funds. Relying on *Bell* v. *New Jersey*, 461 U.S. 773 (1983), which held that the Elementary and Secondary Education Act of 1965 authorized the Secretary of Education to recoup misused grant funds, and on *Atlantic County* v. *United States Department of Labor*, 715 F.2d 834 (3d Cir. 1983), which applied the principles set forth in *Bell* to the 1973 CETA, the ALJ held that "the right of * * * the Department [of Labor] to recoup misspent grant funds is beyond challenge" (Pet. App. 52).

Petitioner also asserted that the length of time between the grant officer's receipt of the audit report and his issuance of the final determination barred the repayment order because the final determination was not issued within the 120-day period set forth in Section 106(b). The ALJ rejected this claim, holding that the failure to issue a final determination within 120 days "does not create a bar to the Department's

recoupment claim" (Pet. App. 54-55).[4] The ALJ's decision became the final decision of the Secretary (see 20 C.F.R. 676.91(f)), and petitioner sought judicial review in the court of appeals pursuant to 29 U.S.C. (Supp. V 1981) 817.

3. The court of appeals unanimously upheld the Secretary's determination (Pet. App. 1-32).[5] The court first rejected petitioner's claim that the Secretary's repayment order was invalid " 'because he failed to issue his Final Determination within 120 days of receipt of the audit' " (*id.* at 5). The court observed that the general rule in interpreting statutes such as Section 106(b) "directing that administrative action 'shall' be completed within a specified time * * * [is] that '[a] statutory time period is not mandatory unless it *both* expressly requires an agency or public official to act within a particular time period *and* specifies a consequence for failure to comply with the provision' " (Pet. App. 8, quoting *Fort Worth National Corp.* v. *FSLIC*, 469 F.2d 47, 58 (5th Cir. 1972) (emphasis added)). The court noted that Section 106(b) does not specify such a consequence and found no evidence that Congress intended to bar the Secretary of Labor from initiating an enforcement action after the expiration of the 120-day period.

The court of appeals further concluded that the legislative history of the 1973 CETA "significantly

---

[4] The ALJ also rejected petitioner's claims that the grant officer bore the burden of proving that the funds were misspent and that the government's "trust obligations toward the Indian Tribes" barred the Secretary from recovering the misspent grant funds (Pet. App. 53-54).

[5] Petitioner did not dispute before the court of appeals "the merits of the finding that it misused CETA funds in the amount of $39,045.03" (Pet. App. 4).

strengthens the conclusion" that Section 106(b) was not intended to be a jurisdictional bar in instances of delay (Pet. App. 10). Specifically, the court noted that the 120-day period "originated as part of a provision whose purpose was to benefit the victims of prime sponsor non-compliance with CETA. It was not designed to give prime sponsors immunity for misuse of CETA funds unless there was a final determination within 120 days" (Pet. App. 13; citations omitted). The court emphasized that the discussion on the House floor concerning the amendment that became Section 106(b) made "unmistakably clear" that "the running of the deadline was not intended to let non-complying prime sponsors escape the consequences of their non-compliance" (Pet. App. 14, 15).

The court of appeals also rejected petitioner's claim that the Secretary had no authority to order repayment of the grant funds misspent by petitioner. Relying on *Bell* v. *New Jersey, supra*, the court held that Section 602(b) of the 1973 CETA granted the Secretary authority to order repayment of misused CETA grant funds (Pet. App. 20-32). The court noted that five other courts of appeals had relied on *Bell* to reach the same conclusion (Pet. App. 24). The court further stated that, aside from *Bell*, "the history and administrative background of the 1973 Act require the conclusion that the Secretary had authority under the 1973 CETA to order repayment of misspent funds by prime sponsors" (Pet. App. 26).[6]

---

[6] In view of this determination, the court of appeals found no need to decide whether the Secretary's repayment order could be justified on the basis of the retroactive application of the 1978 CETA amendments or the government's common law right to recover misspent grant funds (Pet. App. 21).

Finally, the court of appeals held that petitioner was incorrect in asserting that the Secretary's repayment authority had been eliminated by the repeal of the CETA in 1982. The court found that the savings clauses in the Job Training Partnership Act of 1982, 29 U.S.C. 1591(d) and (e), preserved the Secretary's repayment authority under CETA with respect to this case (Pet. App. 31-32).

ARGUMENT

1. The first question presented in this case is the same as the issue now before the Court in *Brock* v. *Pierce County*, cert. granted, No. 85-385 (Nov. 4, 1985); *i.e.*, whether Section 106(b) of the 1978 CETA bars the Secretary of Labor from recovering misspent CETA funds when he fails to issue a final determination within 120 days.[7] Here, the court of appeals upheld a decision of the Secretary directing the repayment to the United States of misspent CETA funds despite the fact that the Secretary did not issue a final determination within 120 days. We demonstrated in our brief in *Pierce County* (at 11-32) that this interpretation of Section 106(b) is correct because it accords with a well-settled rule of statutory construction as well as the explicit legislative history and purposes of the CETA. With respect to this question, therefore, the Court should hold the petition pending its decision in *Pierce County*.

2. The court of appeals correctly determined that Section 602(b) of the 1973 CETA authorized the Secretary to order repayment of the CETA grant funds misspent by petitioner. All of the other courts of ap-

---

[7] We have served counsel for petitioner with a copy of our brief in *Brock* v. *Pierce County*.

peals that have addressed the Secretary's authority to require repayment under Section 602(b) have reached the same conclusion. See *Mobile Consortium of CETA* v. *United States Department of Labor*, 745 F.2d 1416, 1418 (11th Cir. 1984); *California Tribal Chairman's Ass'n* v. *United States Department of Labor*, 730 F.2d 1289, 1291 (9th Cir. 1984); *North Carolina Commission of Indian Affairs* v. *United States Department of Labor*, 725 F.2d 238, 240-242 (4th Cir. 1984), cert. denied, No. 83-1981 (Oct. 1, 1984); *Texarkana Metropolitan Area Manpower Consortium* v. *Donovan*, 721 F.2d 1162, 1164 (8th Cir. 1983) (per curiam); *Atlantic County* v. *United States Department of Labor*, 715 F.2d 834, 835-837 (3d Cir. 1983) (per curiam). Moreover, this Court recently denied a petition for a writ of certiorari raising this issue. *North Carolina Commission of Indian Affairs* v. *United States Department of Labor*, cert. denied, No. 83-1981 (Oct. 1, 1984). Further review therefore is not warranted.[8]

As we discuss in detail in our brief in opposition in *North Carolina Commission of Indian Affairs* (at 6-13),[9] the Court's decision in *Bell* v. *New Jersey*, 461 U.S. 773 (1983), holding that the Secretary of Education may recover misused grant funds under the Elementary and Secondary Education Act, mandates the conclusion that the Secretary of Labor may re-

---

[8] Petitioner suggests (Pet. 8) that this issue somehow is related to the question presented in *Pierce County*. However, as petitioner's arguments and the court of appeals' opinion both demonstrate, the issues are completely distinct (compare Pet. 6-7 with Pet. 8-11; compare Pet. App. 5-19 with Pet. App. 20-32).

[9] We have served counsel for petitioner with a copy of this brief in opposition.

cover misused grant funds under the substantially similar provision of the 1973 CETA statute. The factors relied upon in *Bell*—the statutory language, congressional intent, and consistent administrative interpretation of the statute—all demonstrate that the 1973 Act authorized the Secretary to require repayment of misspent CETA funds. See also Pet. App. 20-31.

Petitioner argues (Pet. 9-11) that *Bell* is inapposite because Section 106(d), a provision added to the CETA statute in 1978 that authorizes recoupment of misspent grant funds, would have been unnecessary if Section 602(b) authorized the recovery of such funds. However, the legislative history indicates that the 1978 CETA amendments were designed to "expand[] and clarif[y] existing law" (S. Rep. 95-891, 95th Cong., 2d Sess. 15 (1978)). Congress was aware of the Secretary's practice of requiring repayment of misspent funds. See 124 Cong. Rec. 25168 (1978) (statement of Rep. Hawkins); *id.* at 25221 (statement of Rep. Cornell); *id.* at 31021 (statement of Rep. Maguire); *id.* at 31026 (statement of Rep. Collins). In light of Congress's intent to clarify the Secretary's authority, it is not surprising "that in drafting the much more extensive and detailed provisions setting out the Secretary's authority [in 1978], Congress chose to make the Secretary's power to order repayment express" (Pet. App. 30-31).

Contrary to petitioner's assertion, moreover, the statute at issue in *Bell* contained similar provisions. The 1978 amendments to the Elementary and Secondary Education Act included an express repayment provision similar to Section 106(d) of the 1978 CETA amendments (see Pub. L. No. 95-561, § 185(b), 92 Stat 2191, 20 U.S.C. (Supp. V 1981) 2835(b)).

And this Court in *Bell* rejected a claim virtually identical to petitioner's argument here—that the original Education Act could not be construed to authorize recoupment of misspent grant funds because such an interpretation of that statute would render the 1978 amendment superfluous (see 461 U.S. at 788-789). Here, as in *Bell*, the provision added in 1978 expressly recognized the Secretary's recoupment authority and imposed procedural requirements relating to the dispute resolution process (compare 20 U.S.C. (Supp. V 1981) 2835 with 29 U.S.C. (Supp. V 1981) 816).[10] Thus, the 1973 CETA simply cannot be distinguished from the statute held to authorize repayment in *Bell*.[11]

Petitioner's argument (Pet. 12-13) that any repayment authority vested in the Secretary was lost when the CETA was repealed and replaced by the Job Training Partnership Act is mystifying. The Job Training Partnership Act expressly provides that the repeal of the CETA would "not affect administrative or judicial proceedings pending on October 13, 1982,

---

[10] Petitioner attempts (Pet. 9-10) to distinguish the CETA from the Education Act on the ground that the 1978 CETA amendments both reenacted Section 602(b) and added Section 106(d); petitioner claims that Section 106(d) would have been unnecessary if Section 602(b) authorized repayment orders. However, the 1978 amendments to the Education Act similarly contained an express repayment provision (20 U.S.C. (Supp. V 1981) 2835(b)) and a provision authorizing payment adjustments similar to Section 602(b) of the CETA (see 20 U.S.C. (Supp. V 1981) 1226a-1).

[11] Since the 1973 CETA authorized the Secretary's repayment order, there is no need to address petitioner's argument (Pet. 11-12) that the repayment provision added by the 1978 amendments cannot be applied retroactively to uphold the repayment order.

or begun between October 13, 1982, and September 30, 1984" (29 U.S.C. 1591(e)). Since the administrative proceeding in this case was pending on October 13, 1982, the Secretary's authority under the CETA plainly was preserved by this provision. Furthermore, the grant officer's determination directing petitioner to repay the misspent funds to the United States was issued on September 28, 1981, and therefore was preserved by the statutory provision stating that "[a]ll * * * determinations * * * [issued on or before September 30, 1983] shall continue in effect until modified or revoked by the Secretary, by a court of competent jurisdiction, or by operation of law other than [the Job Training Partnership Act]" (29 U.S.C. 1591(d)).

Petitioner's unsupported assertion that these savings clauses only apply to "*Secretarial* determinations or proceedings based upon such determinations" (Pet. 13 (emphasis in original)) would impose a limitation that is contrary to the broad language of the savings clauses. Proceedings before the Secretary's designees —the grant officer and the ALJ—obviously are encompassed within the savings clauses.

CONCLUSION

As to Question 1, the Court should hold the petition and dispose of it as appropriate in light of the decision in *Brock* v. *Pierce County*. In all other respects, the petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

GEORGE R. SALEM
Deputy Solicitor of Labor

ALLEN H. FELDMAN
Acting Associate Solicitor

MARY-HELEN MAUTNER
Counsel for Appellate Litigation

STEVEN J. MANDEL
Attorney
Department of Labor

FEBRUARY 1986

☆ U. S. GOVERNMENT PRINTING OFFICE: 1986 491507 20150